Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

IN RE: AEROQUIP CORPORATION, CHEVRON, U.S.A., PARKER-HANNIFIN CORPORATION, SEQUENTIA, INC., AMOCO OIL COMPANY, BASF CORPORATION, ICI AMERICAS, INC., ICI ACRYLICS, INC., FRIGOSCANDIA FOOD PROCESS SYSTEMS, INC., STEIN, INC., DANA CORPORATION, W.W. GRAINGER, INC., HONEYWELL, INC., CHEMED CORP., GATES RUBBER COMPANY, EATON CORPORATION, SQUARE D COMPANY, CRANE COMPANY, KEMLITE COMPANY, BRUNSWICK CORPORATION, VAPOR CORPORATION, ECLIPSE INCORPORATED, SOUTHEAST COOLER CORPORATION, WORMALD FIRE SYSTEMS, INC., and MOBIL OIL CORPORATION,

Petitioners.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the Fourth Circuit Court of Appeals err, by refusing to issue a Writ of Mandamus, in allowing the United States District Court for the Middle District of North Carolina to overrule improperly and without authority prior findings and a decision issued in this case by the United States District Court for the Eastern District of Texas?

Does a United States District Court have the power to remand a case on equitable grounds pursuant to 28 U.S.C. § 1452(b) if it was not the court to which the case was initially removed pursuant to 28 U.S.C. § 1452?

PARTIES TO THE MANDAMUS PETITION PROCEEDING IN THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

The parties who pursued the Petition for Mandamus in the Court of Appeals for the Fourth Circuit (the court whose decision is sought to be reviewed) are listed below, along with their parent companies and nonwholly owned subsidiaries (publicly held):

Aeroquip Corporation—parent company: Trinova Corporation; no subsidiary

Amoco Oil Company—parent company: Amoco Corporation; no subsidiary

BASF Corporation—parent company: BASF A.G.; no subsidiary

Brunswick Corporation—parent company: Old Orchard Industrial Corp.; no subsidiary

Chemed Corporation—Dubois Chemicals, formerly a division of Chemed; Dubois Chemicals was acquired by Diversey Corporation; parent company of Diversey Corporation: The Molson Companies, Ltd.; no subsidiary

Chevron, U.S.A.—parent company: Chevron Corporation; no subsidiary

Crane Company—no parent company or subsidiary

Dana Corporation—no parent company; subsidiaries: Albarus, S.A. Industrial E Comercio; Albarus Sistemas Hidraulicos, Ltda.; E. Daneri I.C.S.A.; Hayes-Dana, Inc.; Industrial de Eyes y Transmissiones, S.A. (Transejes); Mahindra & Mahindra; Perfect Circle Victor, Ltd.; Rosetta Technologies, Inc.; Reinz Talbros, Ltd.; Super Circle Gasket, Ltd.; Spicer, S.A.; Victor Gaskets de Colombia, S.A.

Eaton Corporation—no parent company or subsidiary

Eclipse Incorporated—no parent company or subsidiary

Frigoscandia Food Process Systems, Inc.—parent company: Frigoscandia, Inc.; no subsidiary

Gates Rubber Company—no parent company or subsidiary

Honeywell, Inc.—no parent company or subsidiary

ICI Acrylics, Inc.—parent company: Imperial Chemical Industries, PLC; no subsidiary

ICI Americas, Inc.—parent company: Imperial Chemical Industries, PLC; no subsidiary

Kemlite Company—parent company: Crane Co.; no subsidiary

Mobil Oil Corporation—parent company: Mobil Corporation; no subsidiary

Olympic Oil Company—no parent company or subsidiary

Parker-Hannifin Corporation—no parent company or subsidiary

Sequentia, Inc.—no parent company or subsidiary

Southeast Cooler Corporation—no parent company or subsidiary

Square D Company—no parent company or subsidiary

Stein, Inc.—parent company: Frigoscandia, Inc.; no subsidiary

Superior Door Company—no parent company or subsidiary

Vapor Corporation—now known as Old Orchard Industrial Corp.; no parent company or subsidiary

W.W. Grainger, Inc.—no parent company or subsidiary

Wormald Fire Systems, Inc.—proper name: Wormald U.S. Inc.; parent company: Tyco International, Inc.; no subsidiary

The names of the persons and companies who were listed in the caption of Plaintiffs' Complaint initially filed in the Texas state court are set out at pp. 22a-27a of the Appendix.

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STATEMENT OF BASIS OF JURISDICTION

Date of Order sought to be reviewed (*i.e.*, the Fourth Circuit's Order denying petitioners' Petition for Writ of Mandamus): August 2, 1995.

Date of the Fourth Circuit's denial of petitioners' Petition for Rehearing: September 12, 1995.

This Court has jurisdiction to review the order in question by virtue of 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

28 U.S.C. § 157. Procedures

> (b)(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. § 1452. Removal of claims related to bankruptcy cases

> (a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.
>
> (b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

STATEMENT OF THE CASE

On September 3, 1991, a fire at the Imperial Food Products, Inc. ("Imperial") plant in Hamlet, North Carolina (the "Hamlet Fire") took the lives of 25 employees of

Imperial and injured many others. Representatives of the decedents and injured parties filed a multiplicity of lawsuits against Imperial in North Carolina, the state where the fire occurred and the injuries were sustained. As a result of that litigation and actions taken by the State of North Carolina, Imperial was forced into involuntary bankruptcy in the bankruptcy court in North Carolina. Eventually, the personal injury and wrongful death claims then pending in North Carolina were settled. That settlement was overseen by the bankruptcy court and the United States District Court for the Middle District of North Carolina. The administration of the Imperial bankruptcy continues in North Carolina, and the bankruptcy trustee for Imperial is still engaged in adversary proceedings in the bankruptcy court, including two proceedings against several Petitioners based on the same theories raised by Plaintiffs in this case.

On July 23, 1993, almost 200 plaintiffs instituted this case—a products liability action claiming wrongful death, personal injury, and other torts against almost 50 corporations whose products were allegedly present at the Hamlet Fire in North Carolina. *See* Appendix pp. 22a-27a (list of parties on Complaint). However, this action was not initiated in North Carolina, even though most of the Plaintiffs are North Carolina residents or the personal representatives of North Carolina decedents' estates. Instead, Plaintiffs instituted the action in a Texas state court.[1]

On August 24, 1993, the entire case was removed by Defendant PNC Bank pursuant to 28 U.S.C. § 1452(a) to the Bankruptcy Court for the Eastern District of Texas, Beaumont Division.[2] Plaintiffs then filed a motion for

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[1] Plaintiffs filed their action in a state whose law at the time did not recognize nor apply the principle of *forum non conveniens*, and hence the unfairness of Plaintiffs' forum shopping could not be challenged in the state court on that ground.

[2] The court of first instance possessed federal subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1334.

remand with the bankruptcy court in Texas. Plaintiffs' supporting memorandum requested a remand to Texas state court on equitable grounds pursuant to 28 U.S.C. § 1452(b). The Defendants joined issue on the question of equitable remand by memorandum of PNC Bank in support of its answer to the Plaintiffs' motion for remand dated September 29, 1993, and by responsive pleading of the remaining Defendants detailing the factors to be considered by the court in determining the issue of equitable remand under the Bankruptcy Act. Thereafter, periodic supplemental briefs, memoranda, reports and affidavits were filed over the course of ten months in the bankruptcy court in Texas.[3]

Paralleling the Plaintiffs' motion for remand, certain Defendants moved for dismissal of the action for lack of personal jurisdiction or, in the alternative, for transfer of the action to the United States District Court for the Middle District of North Carolina ("North Carolina District Court"). In support of the motions for transfer, the Defendants demonstrated that the vast majority of the Plaintiffs were residents of North Carolina or adjacent areas of South Carolina. Moreover, the center of gravity as determined by site of the fire, relevant witnesses, facts, documents, discovery materials and parties is located in North Carolina.

On July 11, 1994, United States Bankruptcy Judge Donald R. Sharp issued a report and recommendation that the federal district court, rather than the bankruptcy court, was vested with subject matter jurisdiction over the removed case. *See* Report and Recommendation to District Court (Bankr. E.D. Tex. July 11, 1994) (Appendix pp. 10a-15a). Judge Sharp recommended transfer of the

[3] The Texas bankruptcy and federal district courts had the benefit of the supporting brief of the Plaintiffs (31 pages), PNC's response (12 pages) and supporting brief (47 pages), Defendants' response and brief (17 pages) and numerous multi-page filings.

case to the North Carolina District Court for a determination as to the district within North Carolina in which the case should be tried. *Id.* (Appendix p. 15a). The report and recommendation of Judge Sharp was then subject to critical review and comment by all parties. The Plaintiffs filed an objection to the bankruptcy judge's report and recommendation. Plaintiffs raised in this objection arguments on jurisdiction and equitable remand under 28 U.S.C. § 1452(b).

After considering Plaintiffs' motion to remand and Defendants' motion to transfer and the numerous supporting legal memoranda, United States District Judge Howell Cobb adopted on August 5, 1994, the recommendations of Judge Sharp as his findings of fact, *see* Order of Withdrawal of Reference (E.D. Tex. Aug. 5, 1994) (Appendix pp. 16a-17a), and in a separate order, Judge Cobb transferred the case to the North Carolina District Court. Order of Transfer (E.D. Tex. Aug. 5, 1994) (Appendix pp. 18a-19a). Judge Cobb specifically recognized a number of equitable grounds for trying the case in North Carolina, including that the operative facts, parties, witnesses, and evidence are located in North Carolina. Judge Cobb specifically found that "the interests of justice require the transfer of this case to the District where it belongs." *Id.* (Appendix p. 19a). Judge Cobb's transfer order clearly stated that he was transferring the case to the Middle District of North Carolina for a determination under 28 U.S.C. § 157 as to where the case shall be tried. *Id.* Remanding the case to a state court in Texas was not one of the options provided.

Despite the clear instruction from Judge Cobb, and contrary to the previous findings and Order of Judge Cobb, the North Carolina District Court (Tilley, J.) on June 26, 1995, ruled that remand to a Texas state court was warranted under 28 U.S.C. § 1452(b). *See* Memorandum Opinion (M.D.N.C. June 26, 1995) (Appendix pp. 2a-8a).

Petitioners filed a Petition seeking a Writ of Mandamus from the Fourth Circuit directing the North Carolina District Court to vacate its order remanding the case on the grounds that it had no power to remand under 28 U.S.C. § 1452(b), that it exceeded its statutorily defined power and usurped judicial authority of a sister court, and that it disregarded law of the case implicit in the prior decision of a sister court.

A three-judge panel of the United States Court of Appeals for the Fourth Circuit denied the Petition for Mandamus with no explanation for its decision. *See* Order Denying Petition for Writ of Mandamus (4th Cir. Aug. 2, 1995) (Appendix p. 1a). Petitioners filed a petition for rehearing with suggestion for rehearing in banc, but that petition was denied. *See* Order Denying Petition for Rehearing and Rehearing in Banc (4th Cir. Sept. 12, 1995) (Appendix pp. 20a-21a). A member of the United States Court of Appeals for the Fourth Circuit requested a poll on the suggestion for rehearing in banc. Two judges voted to rehear the case in banc, the majority (six) voted against. *Id.* (Appendix p. 21a).

ARGUMENT

In denying petitioners' Petition for Writ of Mandamus, the Fourth Circuit Court of Appeals has sanctioned the departure of a United States district court from the accepted and usual course of judicial proceedings to such a degree as to call for an exercise of this Court's power of supervision. *See* Supreme Court Rule 10(a). Specifically, when the North Carolina District Court ordered remand of this case to the Texas state court, it (1) overruled the prior findings and a decision of a sister court, and (2) ignored the plain language of a federal statute. The Fourth Circuit improperly denied petitioners' request for mandamus relief to correct this clear violation of judicial proceeding and statutory authority. In so doing, the Fourth Circuit sanctioned the action of the North Carolina District Court in violation of important rules of judicial proceeding which this Court strives to safeguard.

I. THE NORTH CAROLINA DISTRICT COURT IMPROPERLY AND WITHOUT AUTHORITY OVERRULED THE TEXAS DISTRICT COURT'S IMPLICIT DENIAL OF REMAND AND EXPRESS FINDING THAT EQUITABLE FACTORS DISFAVORED REMAND TO THE TEXAS STATE COURT

In this case, one federal court has overruled the prior findings and a decision of a sister court. This is a clear violation of judicial proceeding that has been the subject of recent concern to this Court. *See Celotex Corp. v. Edwards*, —— U.S. ——, 115 S. Ct. 1493 (1995).

In *Celotex*, this Court stated:

> We have made clear that '[i]t is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected.'

Celotex, 115 S. Ct. at 1501 (citing *Walker v. Birmingham*, 388 U.S. 307, 314 (1967) (quoting *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922)).[4] This Court noted that permitting litigants to stray from this edict cannot be done without "*seriously undercutting the orderly process of law.*" *Celotex*, 115 S. Ct. at 1501 (emphasis supplied). This case should be reviewed to enable this Court to ensure that circuit courts of appeal do not sanction a course of proceeding by lower courts that could undercut the orderly process of law. Respect for the findings and decisions of courts of coordinate jurisdiction is

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[4] The dissent in *Celotex* focussed on a distinction it drew between the ruling of an Article III judge versus the ruling of a non-Article III judge, and a difference in weight to be afforded each of the two rulings. In this case, a non-Article III judge made a recommendation. However, an Article III judge actually entered the Order transferring this case, which Order established "law of the case" in this action.

vital to principles of comity and the orderly litigation of cases which pass through such courts of coordinate jurisdiction. When the North Carolina District Court ordered this case remanded to Texas State court, it violated this important rule of judicial proceeding. When the Fourth Circuit failed to grant mandamus relief to correct this violation, it sanctioned that improper judicial action of the district court and failed to uphold the important rules of judicial proceeding promoted by this court in *Celotex*.

To reach the North Carolina District Court, this case was transferred from the United States District Court for the Eastern District of Texas ("Texas District Court"). In accordance with *Celotex*, all orders entered by the Texas District Court were to be respected by the coordinate transferee court.

The Texas District Court, prior to ordering a transfer, had before it plaintiffs' motion for remand and numerous briefs addressing the equitable factors that favored—or disfavored—remand to Texas state court. Judge Cobb did *not* defer ruling on the motion for remand. Indeed, he was the only judge with authority to order a remand pursuant to 28 U.S.C. § 1452(b).[5]

In cases where motions to remand are filed during the pendency of a motion to transfer, courts routinely decide the remand first as it may render the issues raised by the motion to transfer moot or tangential. *See Williams v. Shell Oil Co.*, 169 B.R. 684, 694 n.9 (S.D. Cal. 1994). Thus, it is fair to infer that Judge Cobb did not reach the transfer issue until after rejecting the arguments supporting remand under § 1452(b). To reach any other conclusion requires a finding that Judge Cobb either inadvertently or, worse, deliberately left a significant issue undecided when

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[5] Section 1452(b) provides authority to remand a case on equitable grounds only to the court to which a case is removed. No other court is vested with that authority. *See infra* at 11-14.

he was the only judge with the authority to decide the issue.

In ordering the transfer, Judge Cobb made a finding that "the interests of justice require[d] the transfer" of this case to North Carolina, the "District where it belongs." Order of Transfer (E.D. Tex. Aug. 5, 1994) (Appendix p. 19a). Judge Cobb cited 28 U.S.C. § 157 which provides:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

Order of Transfer (Appendix p. 18a). Judge Cobb then noted: "Because the bankruptcy case was filed in the Middle District of North Carolina, that court should determine where the claim should be tried." *Id.* (Appendix pp. 18a-19a). Judge Cobb's order thus provided the transferee court with only two choices for where this case could be tried, and asked the transferee court to choose between them.

By transferring this case to North Carolina, the Texas District Court implicitly denied Plaintiffs' motion for remand. If the court had thought remand to Texas state court was proper, it would not have sent the case to North Carolina "where it belongs" for a district court there to decide if it should be tried in the district court where the claim arose or in the district court where the bankruptcy case is pending—both districts being located in North Carolina.

Further, all equitable considerations favoring—or disfavoring—remand to the Texas state court were placed squarely before Judge Cobb and were briefed at length by the parties while this case was pending in the Texas federal courts. Extensive legal arguments were presented

on these issues by the parties. Ultimately, Judge Cobb found that:

> [a]ll operative facts took place in North Carolina. Consequently, most, if not all, parties, witnesses, and evidence are located in North Carolina. Furthermore, the bankruptcy case was filed in the Middle District of North Carolina. Finally, the only apparent connection between the case and the Eastern District of Texas is the residence of one of the plaintiffs' attorneys.

Id. (Appendix p. 19a). Thus, Judge Cobb found that equitable factors favored trial in North Carolina and disfavored remand to Texas state court, a finding in direct conflict with the North Carolina District Court's subsequent order remanding the case to Texas on equitable grounds.

When the North Carolina District Court ignored the ruling of the Texas District Court and decided that the case did not belong in North Carolina and should be returned to Texas, it effectively overruled the existing findings and decision of the District Court in Texas. A North Carolina District Court judge does not have any appellate or supervisory role according it the right to review the decisions of a coequal federal judge. *See Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 168 (3d Cir. 1982) (judges of coordinate jurisdictions sitting in the same case should not overrule the decisions of each other). A collateral attack by a district court in the Fourth Circuit on existing orders of a district court in the Fifth Circuit cannot be permitted.

The transfer order of the Texas District Court, with its underlying predicate rejection of the motion to remand, constitutes the "law of the case." " '[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent states in the same case.' " *Christianson v. Colt Industries Operating Corp.*,

486 U.S. 800, 816 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). It does not matter whether transferor and transferee courts are involved: the "law of the case" applies to prior rulings of a coordinate transferor court. *Christianson*, 486 U.S. at 816. "Adherence to the law of the case principles is even more important . . . where the transferor judge and the transferee judge are not members of the same court. [T]he principles of comity among courts of the same level of the federal system provide a further reason why the transferee court should not independently re-examine an issue already decided by a court of equal authority." *Hayman Cash Register Co.*, 669 F.2d at 169. Furthermore, implied rulings by the transferor court are due the same respect and protection under the "law of the case" as are explicit rulings. *See Christianson*, 486 U.S. at 817 ("That the . . . [transferor court] did not explicate its rationale is irrelevant, for the law of the case turns on whether a court previously 'decide[d] upon a rule of law'— . . . not on whether, or how well, it explained the decision."). Therefore, by ordering remand, the North Carolina District Court violated its obligation to respect the prior decision of a coequal court from a different circuit. This Court should review this case to address the Fourth Circuit's sanctioning of divergence by one of its district courts from the accepted and usual course of judicial proceeding.

II. A COURT OTHER THAN THE ONE TO WHICH A CASE IS REMOVED LACKS POWER TO REMAND ON EQUITABLE GROUNDS PURSUANT TO 28 U.S.C. § 1452(b)

This case was removed to the federal court under 28 U.S.C. § 1452(a) and may be remanded on or for equitable grounds only under 28 U.S.C. § 1452(b). Unlike the remand in *Things Remembered, Inc. v. Petrarca*, No. 94-1530, 1995 WL 709623, 1995 U.S. LEXIS 8531 (U.S. Dec. 5, 1995), which was based on the untimeliness of removal, the remand in the present action was

based *exclusively* on equitable grounds. There were no jurisdictional defects in this action.

No case has been found applying 28 U.S.C. § 1452(b) to authorize a court other than the one to which a case was removed to remand that case on equitable grounds. Because § 1452(b) provides the only basis for a district court (to which a case is removed) to remand on equitable grounds (no provision in 28 U.S.C. § 1447(c) authorizes remand on equitable grounds), the statute itself, § 1452(b), provides the only authority on the matter.

The statute clearly and unequivocally states that "[*t*]*he court to which such claim or cause of action is removed* may remand such claim or cause of action on any equitable ground." 28 U.S.C. § 1452(b) (emphasis added). It is axiomatic that in construing federal statutes, one must assume that the ordinary meaning of the language that Congress employed accurately expresses legislative purpose. *See Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985).

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) (citations omitted).

Thus, there can be no question that, under 28 U.S.C. § 1452(b), only the court to which a case is removed may remand that case on equitable grounds. The language of § 1452(b) is unambiguous. There is no room for alternative formulations or interpretive nuance. This case was removed to the Texas District Court. In accordance with the express wording of the statute, that federal court is the only court with the power to remand this case on equitable grounds.

The congressional logic of the bankruptcy removal statute granting remand power on equitable grounds *only* to the court to which the case was removed is elegant. The removal court is in the same district as the state court from which the case is removed. The removal court is in the best position to assess the important equitable factors for remand such as the duplication or uneconomical use of judicial resources, comity, prejudice to involuntarily removed parties and the expertise of the court where the case originated. *See River Cement Co. v. Bangert Bros. Constr. Co.*, 852 F. Supp. 25, 27 (D. Colo. 1994) (citing *In re Finley*, 62 B.R. 361, 366 (Bankr. N.D. Ga. 1986)).

It cannot be seriously argued that a North Carolina district court has a deeper appreciation for these issues than the Texas court familiar with the Texas state court from which the case was removed. Even if reasonable minds could differ on the most effective means to address these important equitable issues under § 1452(b), Congress has foreclosed that debate. Congress has decided the issue in favor of providing authority over equitable remands under § 1452(b) *only* to the court to which the case was removed. In this case, that court was the Texas District Court, not the North Carolina District Court.

However, the North Carolina District Court in the present case, without even addressing or acknowledging the issue involved, simply assumed it had authority to remand on purported equitable grounds under 28 U.S.C. § 1452(b). The North Carolina District Court offered no basis for authority for the remand decision other than § 1452(b). Therefore, unless the North Carolina District Court derived its power under § 1452(b) to remand this case on equitable grounds, it exceeded its authority. Plainly the district court in North Carolina had no power to remand this case under § 1452(b). It was never the court to which the case was removed. It never had authority to issue a remand under § 1452(b). In ordering remand, the North Carolina District Court exceeded its authority.

The Fourth Circuit panel that denied the Petition for Writ of Mandamus must have assumed that the District Court had the authority to remand, and thus overlooked or failed to follow the express dictates of 28 U.S.C. § 1452(b). Petitioners acknowledge that other remand statutes provide the authority to remand in other situations. However, § 1452(b) is unique in imposing the limitation that it is "[t]he court to which such claim . . . is removed [that] may remand such claim . . . on any equitable ground." By not granting the Petition for Writ of Mandamus, the Fourth Circuit allowed the North Carolina District Court to exercise authority not granted to it by 28 U.S.C. § 1452(b).

III. MANDAMUS RELIEF WAS WARRANTED IN THIS CASE

In this case, the North Carolina District Court exceeded its authority by overruling the order of a coequal court and usurping the authority given by Congress exclusively to the Texas court to which this Texas state court action was removed. This is an extraordinary overreaching by a district court.

When no other adequate remedy is available, review of an improper or unauthorized order remanding a case must be by writ of mandamus. *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 353 (1976); *Jamison v. Wiley*, 14 F.3d 222, 234 (4th Cir. 1994). This Court in *Thermtron* held that remand orders, because they are not "final judgment[s] reviewable by appeal" are properly reviewed by " 'mandamus to compel action, and not by writ of error to review what has been done'." *Thermtron*, 423 U.S. at 353 (quoting *Railroad Co. v. Wiswall*, 90 U.S. 507, 508 (1874)).

More recently, *Jamison* held that 28 U.S.C. § 1447(d) does not prevent in all instances the court from reviewing an order remanding an action to state court.

> On its face, § 1447(d) appears to preclude appellate review of all remand orders, regardless of basis. But

> as we all know, the Supreme Court has declined to give § 1447(d) such a literal meaning, holding instead that it insulates from review only those remand orders that are based on grounds specified in 28 U.S.C. § 1447(c).

Jamison, 14 F.3d at 231 (citing *Thermtron*).

The *Jamison* opinion rejected the claim that the remand at issue was "a remand order and nothing more" thus precluding review. *Id.* Moreover, the court in *Jamison* held that under the removal statute at issue, 28 U.S.C. § 1442(a)(1).

> . . . the district court had no right to decline to exercise jurisdiction over the removed action and its decision to do so was an error of sufficient magnitude to merit mandamus relief.

Jamison, 14 F.3d at 239. *See also Kolibash v. Committee on Legal Ethics of W. Va. Bar*, 872 F.2d 571, 573 (4th Cir. 1989) (recognizing that a district court has no authority to abstain from the exercise of mandatory jurisdiction on any ground other than specified by statute).

The common thread in the *Jamison* and *Kolibash* cases is that a district court may not exceed its authority in declining to exercise its mandatory jurisdiction over a removed action. The same principle, a court may not exceed its authority in making remand decisions, must apply when the court's decision to remand a case is outside its statutory authority. Such a decision exceeds its authority and must be subject to mandamus. *See Thermtron*, 423 U.S. at 351 ("Because the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the writ of mandamus was not barred by § 1447(d).").

The recently-decided *Things Remembered, Inc. v. Petrarca*, No. 94-1530, 1995 WL 709623, 1995 U.S. LEXIS 8531 (U.S. Dec. 5, 1995), does not prevent this

Court from reviewing the Fourth Circuit's refusal to rectify the North Carolina District Court's unauthorized exercise of the power to remand in the present case. *Things Remembered* is inapplicable here. The remand in *Things Remembered* was based on the untimeliness of removal, but the remand in the present action was based *exclusively* on equitable grounds by a court not authorized to consider such grounds. Therefore, unlike in *Things Remembered*, there are no procedural or jurisdictional defects in the present case. This case is analogous to *Thermtron* in that the remand decision was outside the power of the court. *See Things Remembered*, 1995 WL 709623, at *4, 1995 U.S. LEXIS 8531, at *11 (Kennedy, J., concurring) (noting the observation in *Thermtron* that "a remand order other than the orders specified in subsection (c) [of 28 U.S.C. § 1447] had 'no warrant in the law' and could be reviewed by mandamus").

The remand order in this case exceeded the authority of the North Carolina District Court under § 1452(b) and violated the principle of deference to the order of a coequal court. As long ago as 1934, the Fourth Circuit held that a district court may be ordered by mandamus to hear and decide a case that it had improperly ordered remanded to state court. *See Travelers' Protective Ass'n of America v. Smith*, 71 F.2d 511 (4th Cir. 1934).

Mandamus was the appropriate means to direct that the North Carolina District Court's Order and Memorandum Opinion be vacated and that the North Carolina District Court exercise jurisdiction to hear and determine this case. This Court should review the Fourth Circuit's denial of the Petition for Writ of Mandamus.

CONCLUSION

For the reasons stated herein, this Court should review this case in order to address the way in which the Fourth Circuit Court of Appeals has sanctioned the departure by one of its district courts from the accepted and usual course of judicial proceeding. As indicated by this Court's decision in *Celotex Corp. v. Edwards*, —— U.S. ——, 115 S. Ct. 1493 (1995), the issues raised by this petition are of recent concern to this Court. This Court should review this case to ensure that the principles of judicial proceeding announced in *Celotex* are observed by the district courts and enforced by the circuit courts of appeal.

Respectfully submitted,

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APPENDIX A

[Filed August 2, 1995]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2303
CA-94-447-3

IN RE: AEROQUIP CORPORATION; CHEVRON, U.S.A., PARKER-HANNIFIN CORPORATION; SEQUENTIA, INCORPORATED; AMOCO OIL COMPANY; BASF CORPORATION, ICI AMERICAS, INCORPORATED; ICI ACRYLICS, INCORPORATED; FRIGOSCANDIA FOOD PROCESS SYTEMS, INCORPORATED; STEIN, INCORPORATED; SUPERIOR DOOR COMPANY; DANA CORPORATION; W. W. GRAINGER, INCORPORATED; HONEYWELL, INCORPORATED; CHEMED CORPORATION; OLYMPIC OIL COMPANY; GATES RUBBER COMPANY; EATON CORPORATION; SQUARE D COMPANY; CRANE COMPANY; KEMLITE COMPANY; BRUNSWICK CORPORATION, VAPOR CORPORATION, ECLIPSE INCORPORATED, SOUTHEAST COOLER CORPORATION; WORMALD FIRE SYSTEMS, INCORPORATED; AND MOBIL CORPORATION,

Petitioners

Petitioner has filed a petition for writ of mandamus.

The Court denies the petition.

Entered at the direction of Judge Phillips, with the concurrence of Judge Hall and Judge Michael.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX B

[Filed Jun. 26, 1995]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA ROCKINGHAM DIVISION

No. 3:94CV447

DAVID MACK ALBRIGHT, *et al.*,
Plaintiffs,

v.

AEROQUIP CORPORATION, *et al.*,
Defendants.

MEMORANDUM OPINION

TILLEY, District Judge

This case comes before this Court upon transfer from the United States District Court for the Eastern District of Texas. Plaintiffs seek a remand of this case to Texas state court where it was originally filed. Because a remand is warranted under 28 U.S.C. § 1452(b), Plaintiff's motion to remand is GRANTED. As a result, this case will be remanded to the 60th District Court of Jefferson County, Texas.

I.

On September 3, 1991, a fire occurred at the Imperial Foods Products Plant in Hamlet, North Carolina, killing over twenty-five people and injuring many others. Eventually, as a result of the fire, Imperial Foods ("Imperial") was forced into involuntary bankruptcy. On July 23, 1993, Plaintiffs commenced an action against forty-five defendants in the 60th District Court of Jefferson County,

Texas. Plaintiffs consist of the people who were injured in the fire, the personal representatives of the estates of people who died in the fire, and several spouses or relatives who have filed numerous derivative claims. Defendants are supplier corporations to the Imperial plant which according to the complaint are either incorporated or do business in Texas. Imperial Foods is not now and has never been among the named defendants. Plaintiffs assert numerous state law causes of action grounded in personal injury or wrongful death.

One of the defendants originally named, PNC Bank, N.A. ("PNC") is a creditor of Imperial Foods. Pursuant to 28 U.S.C. § 1452(a),[1] PNC removed the case on August 24, 1993 to the United States Bankruptcy Court for the Eastern District of Texas, asserting that the claims made against it constituted property of the bankrupt Imperial estate. Subsequently, several of the named defendants joined in PNC's removal action.

On September 10, 1993, Plaintiffs filed a motion to remand the case to Texas state court primarily on the ground that there was no federal subject matter jurisdiction. Defendants opposed remand and moved to dismiss or, in the alternative, to transfer the case to this Court. On July 8, 1994, the Texas Bankruptcy Court issued a Report and Recommendation to the United States District Court for the Eastern District of Texas which advised the Texas District Court that the Texas Bankruptcy Court was without subject matter jurisdiction over the matter and that the Texas District Court should withdraw refer-

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[1] 28 U.S.C. § 1452(a) states:

> A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

ence of the matter and subsequently transfer the case to this Court for proceedings consistent with 28 U.S.C. § 157(b)(5).[2] On August 5, 1994, Judge Cobb of the United States District Court for the Eastern District of Texas adopted the Texas Bankruptcy Court's recommendation and transferred the case to this Court. On September 20, 1994, this Court convened a status conference in Greensboro at which the parties briefly addressed the issue of whether this Court has subject matter jurisdiction under 28 U.S.C. 1334(b). This Court ordered the parties to submit briefs on the issue of subject matter jurisdiction by October 20, 1994. In addition, following the September 20th status conference, the trustee of the Imperial estate fully settled all claims against PNC. Plaintiffs have also released PNC from all claims. These releases contain verdict reduction provisions which operate to eliminate any co-defendant contribution or indemnity rights against PNC. Consequently, on September 28, 1994, this Court entered an order dismissing PNC from the case. On February 7, 1994, this Court sent a letter to all counsel of record indicating that while the Court was not discounting remand under 28 U.S.C. § 1452(a), it believed that remand on equitable grounds might be appropriate under 28 U.S.C. § 1452(b).[3] Because the propriety of remand under 28 U.S.C. § 1452(b) was not discussed at length in either Plaintiffs or Defendants' original briefs, the Court allowed the parties additional time to submit briefs on the issue of remand under 28 U.S.C. § 1452(b). After careful consideration of the briefs and applicable law, this

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[2] 28 U.S.C. § 157(b)(5) states:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

[3] 28 U.S.C. § 1452(b) states that "[t]he court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground."

Court determines that a remand is appropriate under 28 U.S.C. § 1452(b).

II.

This Court will first address Defendants' argument that Judge Cobb's adoption of the Texas Bankruptcy Court's Report and Recommendation conclusively determined that federal subject matter jurisdiction exists and that his determination is the law of the case. Specifically, Defendants argue that Judge Cobb's transfer order "should not be read in a vacuum, but should be accepted as a disposition of motions extensively briefed and considered." Defendants' Brief on Jurisdiction, Venue, and Due Process at 2. For reasons discussed below, this Court finds that Judge Cobb's order was not the law of the case.

The law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983) (dictum)). The law of the case doctrine applies only to issues actually discussed by the previous court and to issues decided by necessary implication. *See Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985); *Schultz v. Onan Corp.*, 737 F.2d 339, 345 (3rd Cir. 1984). In the present case, on July 8, 1994, Judge Sharp of the United States Bankruptcy Court for the Eastern District of Texas issued a Report and Recommendation to the United States District Court for the Eastern District of Texas, finding that the Bankruptcy Court did not have subject matter jurisdiction over the case under 28 U.S.C. § 157(b)(5). As a result, Judge Sharp recommended that the District Court withdraw reference of this action from the bankruptcy court and subsequently transfer the case to this Court. On August 5, 1994, Judge Cobb of the United States District Court for the Eastern District of Texas adopted the findings of the Report and Recommendation and entered an

order of withdrawal of reference and an order that the case be transferred to this Court pursuant to 28 U.S.C. § 157(b)(5) or alternatively 28 U.S.C. §§ 1404, 1412. Judge Sharp only determined that the Bankruptcy Court did not have subject matter jurisdiction under 28 U.S.C. § 157(b)(5). He made no findings as to whether federal subject matter jurisdiction existed under 28 U.S.C. § 1334(b). As such, Judge Cobb's adoption of Judge Sharp's Report and Recommendation did not address the issue of federal subject matter jurisdiction under 28 U.S.C. § 1334(b). He neither expressly nor impliedly decided the issue federal subject matter jurisdiction under 28 U.S.C. 1334(b). Consequently, the law of the case doctrine does not come into play.

III.

The Court will next consider the issue of federal subject matter jurisdiction under 28 U.S.C. § 1334(b). Plaintiffs contend that with PNC gone as a party, the remaining state law claims are not "related to" the Imperial bankruptcy proceeding and federal subject matter jurisdiction no longer exists.

PNC's notice of removal was filed under 28 U.S.C. § 1452(a) which deals with the removal of claims related to bankruptcy cases. Under Section 1452(a), removal of a claim or cause of action is proper only if the district court for the district where such civil action is pending has jurisdiction under 28 U.S.C. § 1334.[4]

28 U.S.C. § 1452(b) states that "[t]he court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground."

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[4] Section 1334(a) provides that "[e]xcept as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11." Section 1334(b) states that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in title 11 or related to cases under title 11."

Courts have listed several factors to be considered in determining whether a remand is appropriate in a particular case under § 1452(b). Such factors include (1) duplication of judicial resources; (2) uneconomical use of judicial resources; (3) effect of remand on the administration of the bankruptcy estate; (4) the relatedness or remoteness of the action to the bankruptcy case; (5) case involves questions of state law better addressed by a state court; (6) comity; (7) prejudice to the involuntarily removed parties; (8) lessened possibility of an inconsistent result; and (9) expertise of the court where the action originated. *See River Cement Co. v. Bangert Bros. Constr. Co.*, 852 F. Supp. 25, 27 (D. Colo. 1994) (citing *In re Finley*, 62 B.R. 361, 366 (Bankr. N.D. Ga. 1986); *see also Textron Inv. Management Co., Inc. v. Struthers Thermo-Flood Corp.*, 169 B.R. 206, 211 (D. Kan. 1994); *Williams v. Shell Oil Co.*, 169 B.R. 684, 692-93 (S.D. Cal. 1994); *In re Videocart, Inc.*, 165 B.R. 740, 744 (D. Mass. 1994); *Intra Muros Trust v. Truck Stop Scale Co.*, 163 B.R. 344, 346 (N.D. Ind. 1994); *Baxter Healthcare Corp. v. Hemex Liquidation Trust*, 132 B.R. 863, 867-68 (N.D. Ill. 1991) (all listing similar factors). In considering these factors, the Court finds that remand would be appropriate in this case.

While the other factors appear to favor neither side on the issue of remand, those numbered above as 3, 4, 6, and 7 (effect of remand on the administration of the bankruptcy estate, relatedness or remoteness of the action to the bankruptcy case, comity and prejudice to the involuntarily removed parties) strongly support a remand. First, the present state law claims are not sufficiently related to the Imperial bankruptcy proceeding. PNC, a creditor of Imperial Foods, removed the case to federal court, asserting that the claims made against it constituted property of the bankrupt Imperial estate. However, since removal, the Trustee of the Imperial estate has fully settled all claims against PNC. In addition, Plaintiffs

have released PNC from all claims. Second, because the present state law claims are unrelated to the Imperial bankruptcy proceeding, the Court finds that a remand to state court would have very little, if any, effect on the administration of the bankruptcy estate. The releases between Plaintiffs and PNC contain verdict reduction provisions which operate to eliminate any co-defendant contribution of indemnity rights against PNC. As a result, a judgment in favor of Plaintiffs against the remaining Defendants would appear to have little, if any, effect on the Imperial estate. Third, because Plaintiffs' choice of a state forum is entitled to substantial deference, Plaintiffs could be prejudiced by a continuation of this action in federal court. *See River Cement,* 852 F. Supp. at 27. Because of these factors, the Court finds that a remand to state court is appropriate under § 1452(b).

This the —— day of June, 1995.

/s/ N. Carlton Tilley, Jr.
United States District Judge

APPENDIX C

[Filed Jun. 26, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA
ROCKINGHAM DIVISION

No. 3:94CV447

DAVID MACK ALBRIGHT, *et al.*,
Plaintiffs,

v.

AEROQUIP CORPORATION, *et al.*,
Defendants.

ORDER

For the reasons stated in the memorandum opinion filed contemporaneously herewith, IT IS ORDERED that Plaintiff's motion to remand this action to the 60th District Court of Jefferson County, Texas is GRANTED.

This the —— day of June, 1995.

/s/ N. Carlton Tilley, Jr.
United States District Judge

APPENDIX D

[Filed Jul. 11, 1994]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Case No. B-92-12380C-7G
(USBC MDNC Greensboro Div.)

IN RE: IMPERIAL FOOD PRODUCTS, INC.,
a Pennsylvania Corporation
Debtor

Adversary Proceeding No. A-93-1064-S

DAVID MACK ALBRIGHT, *et al.*

VS.

AEROQUIP CORPORATION, *et al.*

REPORT AND RECOMMENDATION
TO DISTRICT COURT

The United States Bankruptcy Court for the Eastern District of Texas (Bankruptcy Court) makes the following report and recommendation pursuant to 28 U.S.C. § 157(c)(1) to be consolidated with the protective notice of removal previously filed in the district court and assigned to the Honorable Howell Cobb, United States District Judge.

The Bankruptcy Court represents that it is without subject matter jurisdiction to entertain the above-styled

and numbered adversary proceeding either in sum or in part. Pursuant to 28 U.S.C. § 157(d) and Fed.R.Bankr. P. 5011 this Court suggests that the honorable district court withdraw reference of this matter for further proceedings. The Bankruptcy Court further recommends that the district court transfer this matter to the district court for the Middle District of North Carolina, Greensboro Division, so that court can make the determination as to where these actions should be tried in accordance with 28 U.S.C. § 157(5). Standing to make the present suggestion is conferred by 11 U.S.C. § 105(a). The following opinion constitutes this Court's proposed findings of facts and conclusions of law in accordance with 28 U.S.C. § 157 (c)(1) and exhibit A hereto constitutes the suggested final judgment for entry by the United States District Court for the Eastern District of Texas.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

On September 3, 1991, a fire destroyed the Imperial Food Products Plant (Imperial) in Hamlet, North Carolina. Over twenty-five (25) persons died and numerous others were injured. Subsequently, Imperial was forced into involuntary bankruptcy. Through the bankruptcy process, the claims of the various plaintiffs in this action against Imperial were compromised. Imperial is not a party to the present action.

On July 23, 1993, over one hundred (100) plaintiffs instituted an action against forty-five (45) defendants in the 60th Judicial District Court of Jefferson County, Texas (the action). The action was assigned case no. B-146,864. Generally, the plaintiffs represent individuals who are or were employees of Imperial; survivors of employees of Imperial; or relatives of employees of Imperial who were working in the particular Imperial facility

destroyed by the fire. Plaintiffs' assert various causes of action grounded in personal injury or wrongful death. The defendants represent parties which provided various equipment, materials, and/or services to the affected facility. Plaintiffs allege that defendants' provision of equipment, material, and/or services is directly or proximately responsible for plaintiffs' damages.

Pursuant to 28 U.S.C. § 1452(a) and Fed.R.Bankr.P. 9027 one of the named defendants, PNC Bank, N.A. (PNC), removed the action to this Court. PNC asserts that the claims made against it by plaintiffs constitute property of the Imperial bankruptcy estate in accordance with 28 U.S.C. §§ 157, 1334 and 11 U.S.C. § 723. Almost all of the named defendants have subsequently joined in PNC's removal action.

The removal has unleashed a flurry of motions. In the case of plaintiffs, the tenor of these motions request either that this Court remand (28 U.S.C. § 1452(b)) or abstain (28 U.S.C. § 1334(c)) from hearing this case on the grounds of 1) lack of bankruptcy court jurisdiction, and 2) comity with state court process. *See* Plaintiffs' Motion to Remand, filed September 10, 1993. Defendants, on the other hand, urge this Court to either dismiss this action for lack of personal jurisdiction (Fed. R.Civ.P. 12(b)(2)) or, on the ground of *forum non conveniens*, to transfer this case to the appropriate United States District Court in North Carolina. *See* Defendants' Motion to Dismiss for Lack of Personal Jurisdiction or, in the Alternative, to Transfer to North Carolina, filed August 24, 1993.

The Bankruptcy Court does not have subject matter jurisdiction over this case

Despite the initial impression that insufficient contacts justify retaining this case for adjudication in a Texas forum this Court concludes that not only does it lack

subject matter jurisdiction to hear this case but it correspondingly lacks subject matter jurisdiction to effect a transfer of this action to North Carolina.

Bankruptcy courts are courts of limited jurisdiction, the parameters of which are determined by reference to 28 U.S.C. §§ 157, 1334. Although defendants, through a multitude of pleadings and briefs, have argued various theories asserting bankruptcy court subject matter jurisdiction over this action on the basis that it 'arises in,' 'arises under,' or is 'related to' a case under title 11, all such arguments are unavailing. This conclusion is mandated by the clear and inescapable language of 28 U.S.C. § 157(b)(5) which provides:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

Whatever characterization is given to this action by defendants this litigation involves nothing more than resolution and liquidation of personal injury and wrongful death claims. Such litigation is solely within the province of the district court. *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 831 n.7 (5th Cir. 1993) ("Personal injury and wrongful death actions are "non-core" proceedings and thus cannot be heard by a bankruptcy court.").

Neither is this Court empowered to dismiss this action for lack of personal jurisdiction over certain party defendants and/or to transfer venue of this case to the appropriate forum in North Carolina. *See* 28 U.S.C. § 1412. Subject matter jurisdiction is an absolute principle—either the court has it or it does not—there are no half measures. Therefore, if a bankruptcy court is

without subject matter jurisdiction to try a personal injury case it is additionally without subject matter jurisdiction to exercise ancillary control over procedural or preliminary matters associated with the case. *Matter of Barker-Fowler Elec. Co.*, 141 B.R. 929, 939 (Bankr. W.D.Mich. 1992) ("Whether [Creditor's] actions under state law to preserve [a] personal injury suit actually tolled the statute of limitations is an issue this court is not authorized, nor does it desire, to resolve."); *In re U.S. Lines, Inc.*, 128 B.R. 339, 341 (S.D.N.Y. 1991) ("[Section 157(b)(5)] is meant to designate which court, as between the bankruptcy court and the district court, should hear personal injury claims against the debtor, and secondarily, to identify which court should determine the venue for such claims."); *In re Smith*, 95 B.R. 286, 291 (Bankr.N.D.N.Y. 1988) ("[Personal injury actions] and any motions relative to their trial, must be addressed to and heard in the district court."); *In re Waterman S.S. Corp.*, 63 B.R. 435, 437 (Bankr.S.D.N.Y. 1986) (Concluding that the district court is the proper forum for determining a motion to transfer venue of a personal injury case.); *In re Johns-Manville Corp.*, 45 B.R. 827, 829 (D.S.D.N.Y. 1984); *In re UNR Industries, Inc.*, 45 B.R. 322, 325 (D.N.D.Ill. 1984).

The reference of this action should be withdrawn by the district court

This Court is of the opinion that it has two remaining options with respect to the disposition of this case. The first is dismissal without prejudice pursuant to Fed.R. Bankr.P. 7012(b)(1). The Court declines to exercise this option. The Court observes that this action has already been removed from state court to the federal system. Dozens of pleadings and several extensively researched briefs addressing the issue of venue have been prepared and filed by the various parties. Given the likelihood that upon any dismissal defendants would imme-

diately remove this action directly to the district court (defendants' previous Protective Notice of Removal, filed in the district court may have already accomplished this result) this option would appear to serve little purpose except to drive up attorneys' fees.

The second option, the present suggestion of withdrawal of reference, is clearly the preferred option. The district court is, pursuant to 28 U.S.C. § 157(b)(5), vested with subject matter jurisdiction over this action. It is further this Court's opinion that the last clause of 28 U.S.C. § 157(b)(5) authorizes the district court in which the bankruptcy case is pending to determine whether the personal injury, tort and wrongful death claims shall be tried in that district or in the district court in the district where the claim arose. It is this provision of the law that prompts this Court to recommend that upon withdrawal of the reference from this Court the matter be transferred to the district court of the Middle District of North Carolina, Greensboro Division, for a determination by that district court as to where these matters shall be heard. Conversely, should the district court find a procedural or jurisdictional defect in the proceeding it is empowered to take dispositive action. Withdrawal of the reference also serves the principle of economy in avoiding the previously discussed costs attendant to a dismissal. For the foregoing reasons, this Court recommends that the honorable district court withdraw reference of this action from the bankruptcy court and then transfer the action to the Middle District of North Carolina, Greensboro Division.

SIGNED on this the 8th day of July, 1994.

/s/ Donald R. Sharp
DONALD R. SHARP
United States Bankruptcy Judge

APPENDIX E

[Filed Aug. 5, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Case No. B-92-12380C-2G
(USBC MDNC Greensboro Div.)

IN RE: IMPERIAL FOOD PRODUCTS, INC.
a Pennsylvania Corporation,
Debtor

Adversary Proceeding No. A-93-1064-S

DAVID MACK ALBRIGHT, *et al.*

VS.

AEROQUIP CORPORATION, *et al.*

ORDER OF WITHDRAWAL OF REFERENCE

The Report and Recommendation from the Bankruptcy Court of the Eastern District of Texas recommending withdrawal of reference and transfer of certain actions to the Middle District of North Carolina, Greensboro Division, came before the Court for consideration. After due consideration of the Report and Recommendation of the Bankruptcy court, this Court enters the following order:

It is ORDERED, ADJUDGED, and DECREED that the Report and Recommendation of the Bankruptcy Court

is hereby approved and the proposed findings of fact and conclusions of law are hereby adopted and all of the proceedings in the captioned matter are ordered withdrawn from the Bankruptcy Court of the Eastern District of Texas to the United States District Court for the Eastern District of Texas.

It is further ORDERED, ADJUDGED, and DECREED that upon withdrawal of this case from the Bankruptcy Court of the Eastern District of Texas, all matters withdrawn will be transferred to the United States District Court for the Middle District of North Carolina, Greensboro Division for further proceedings.

SIGNED August 5, 1994.

/s/ Howell Cobb
HOWELL COBB
United States District Judge

APPENDIX F

[Filed Aug. 5, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

No. 1:93-CV-425

(Consolidated with Adversary Proceeding
No. A-93-1064-S)

DAVID MACK ALBRIGHT, *et al.*

VS.

AEROQUIP CORPORATION, *et al.*

ORDER OF TRANSFER

The Court, having adopted the Report and Recommendation of the Bankruptcy Court for the Eastern District of Texas, is of the opinion that this case should be transferred to the Middle District of North Carolina, Greensboro Division.

28 U.S.C. § 157(5) provides: "The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in which the claim arose, as determined by the district court in which the bankruptcy case is pending." Because the bankruptcy case was filed in the Middle District of North Carolina, that court should determine where the claim should be

tried. Consequently, this case should be transferred to the Middle District for that determination.

Alternatively, transfer is appropriate under 28 U.S.C. §§ 1404, 1412.[1] All operative facts took place in North Carolina. Consequently, most, if not all, parties, witnesses, and evidence are located in North Carolina. Furthermore, the bankruptcy case was filed in the Middle District of North Carolina. Finally, the only apparent connection between the case and the Eastern District of Texas is the residence of one of the plaintiffs' attorneys.

For these reasons, and for the reasons stated in the Bankruptcy Court's Report and Recommendation, the court finds that the interests of justice require the transfer of this case to the District where it belongs.

It is HEREBY ORDERED, ADJUDGED, and DECREED that the above numbered and styled consolidated case is HEREBY TRANSFERRED to the Middle District of North Carolina, Greensboro Division.

SIGNED August 5, 1994.

/s/ Howell Cobb
HOWELL COBB
United States District Judge

---

[1] Because transfer to the Middle District of North Carolina is appropriate under either 28 U.S.C. § 157(b)(5) or 28 U.S.C. §§ 1404(a) and 1412, the court need not decide which provision would control in the event that the provisions produced conflicting results.

APPENDIX G

[Filed September 12, 1995]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2303
CA-94-447-3

IN RE: AEROQUIP CORPORATION; CHEVRON, U.S.A.; PARKER-HANNIFIN CORPORATION; SEQUENTIA, INCORPORATED; AMOCO OIL COMPANY; BASF CORPORATION; ICI AMERICAS, INCORPORATED; ICI ACRYLICS, INCORPORATED; FRIGOSCANDIA FOOD PROCESS SYSTEMS, INCORPORATED; STEIN, INCORPORATED; SUPERIOR DOOR COMPANY; DANA CORPORATION; W. W. GRAINGER, INCORPORATED; HONEYWELL, INCORPORATED; CHEMED CORPORATION; OLYMPIC OIL COMPANY; GATES RUBBER COMPANY; EATON CORPORATION; SQUARE D COMPANY; CRANE COMPANY; KEMLITE COMPANY; BRUNSWICK CORPORATION; VAPOR CORPORATION; ECLIPSE, INCORPORATED; SOUTHEAST COOLER CORPORATION; WORMALD FIRE SYSTEMS, INCORPORATED; and MOBIL OIL CORPORATION,

Petitioners

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Petitioners filed a petition for rehearing with suggestion for rehearing in banc.

Judges Phillips, Hall, and Michael voted to deny the petition for rehearing.

A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Russell and Widener voted to rehear the case in banc, and Judges Hall, Murnaghan, Wilkinson, Niemeyer, Luttig, and Michael voted against rehearing in banc.

Judges Ervin, Wilkins, Hamilton, Williams, and Motz were disqualified and did not participate in the poll.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Phillips for the Court.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX H

CAPTION OF CASE ON ORIGINAL COMPLAINT

The following is the caption of the case appearing on the Complaint initially filed in the District Court of Jefferson County, Texas, 60th Judicial District, Docket No. B-146,864, on July 23, 1993, reflecting the names of the persons and companies who initially were parties to the lawsuit. (Several of the defendants have since been dismissed.)

IN THE DISTRICT COURT
OF JEFFERSON COUNTY, TEXAS
60TH JUDICIAL DISTRICT

No. B-146,864

PLAINTIFFS:

David Mack Albright, Individually and as Administrator of Estate of David Michael Albright, Deceased; Betty H. Albright; Alforence Anderson, Individually and as Administrator of the Estate of Peggy Jean Anderson, Deceased; Gillis Sloan, Jr.; Robert T. Fairley; Maurice E. Fairley; Alfonzo Fairley, Jr.; Scottie Bethea; Vernon McRae; Steve W. McRae; Sammy L. McRae; Brenda Bailey, Flora Cole Banks, Individually and as Administratrix of the Estate of Margaret Teresa Banks, Deceased; James Herbert Banks; Michael Terrell Banks and Markita J. McCollum, Minor, by and through Flora Cole Banks as Next Friend; James Banks; Fred Ernest Ester Barrington, Sr., Individually and as Co-Administrator of the Estate of Fred Ernest Ester Barrington, Jr., Deceased; Nelson Barrington, Individually and as Co-Administrator of the Estate of Fred Ernest Ester Barrington, Jr., Deceased; Linda P. Owens, Individually and as Co-Administrator of the Estate of Fred Ernest Ester Barrington, Jr., Deceased; Crystal Bar-

rington, Minor, by and through Linda Owens as Next Friend; Fred Ernest Ester Barrington, Sr., Individually and as Co-Administrator of the Estate of Josephine Barrington, Deceased; Nelson Barrington, Individually and as Co-Administrator of the Estate of Josephine Barrington, Deceased; Nelson Barrington; Virginia Barrington Jeffery; Peggy Barrington; Linda Barrington; Larry Bellamy, Individually and as Administrator of the Estate of Elizabeth Ann Bellamy, Deceased; Bernetta Odom; Sherman Pouncy, Minor, by and through Larry Bellamy as Next Friend; Romilla Pouncy; Ella Mae Blackstock; Ada Blanchard; Doris Bostic; Dannie Bostic; Donna Branch (now Donna Davis); Evelyn Broady (now Evelyn Wall); Mary Bryant; Ruby Bullard; Nora Bush; Tommie E. Bush; Velma Watts Butler; Elton Ray Cafferata; Bernard Campbell; Joanne Page, Individually and as Administratrix of the Estate of Gail Vivian Campbell, Deceased; Chonna Campbell, Antonio Liles, Minor, by and through Joanne Page as Next Friend; Brenda Chambers, Individually and as Administratrix of the Estate of Rosie Ann Chambers, Deceased; Grimshaw Chambers; Rose Chappell (now Rose Yow); Thomas Coble; Raya Coble; Pamela S. Cooper; Angela Lynn Coulter, Individually and as Administratrix of the Estate of Josie Mae Coulter, Deceased; Rodney Dale Coulter; Betty Jo Coulter; Lillie Bell Davis; John Davis; Johnny Dawkins; Crystal Dawkins; Catherine L. Dawkins, Individually and as Administratrix of the Estate of Phillip Ray Dawkins, Sr.,Deceased; Phillip Ray Dawkins, Jr.; Noel Dawkins Smith; Amy Dawkins; Minor, by and through Catherine L. Dawkins as Next Friend; Linda Ellison; Mattie Fairley; Maurice Fairley; Roy Leon Funderburk; Pearlie Gagnon, Individually and as Administratrix of the Estate of John Robert Gagnon, Sr., Deceased; John Robert Gagnon, Jr.; Michael Gagnon; Scott Gagnon; Minor, by and through

Pearlie Gagnon as Next Friend; Gerard Gagnon, Sr.; Loretta Goodwin; Cynthia Graham; Allison Griffin; Elaine Griffin; Albert Griffin; Marie Hamilton; Patricia W. Hatcher; Felton Albert Hatcher; Bernita Ingram; Rachel Ingram; Homer Jarrell, Individually and as Administrator of the Estate of Bertha Jarrell, Deceased; Otis Jarrell; Kenneth Jarrell; William Jack Kelly, Jr., Individually and as Administrator of the Estate of Brenda Gail Kelly, Deceased; Barbara Elaine Voncannon Kelly; Richard M. Lipford; Susan S. Lipford; Annie Locklear; Evander Lynch, Individually and as Administrator of the Estate of Janice Lynch, Deceased; David Lynch; Christy Lynch; Ina Wall; Sherman McDonald; Brenda McDougald, Monica McDougald; Sandra McPhaul; Alberta McRae; Calvin McRae; Gloria Malachi; Kim Mangus; Sylvia Martin; Von Martin, Minor, by and through Sylvia Martin as Next Friend; Mildred Lassiter Moates; Olin Dellano Moates; Pamela Moore; Margie Morrison, Individually and as Administratrix of the Estate of Michael Morrison, Deceased; Priscilla Murphy; Sally Murphy; Calvin Murphy; Katie Nicholson; Gladys Faye Nolan; Ronnie Carroll Nolan; Thomas Oates; Delores F. Oates; Bernetta (Felecia) Odom; William E. Peele, Individually and as Co-Administrator of the Estate of Rose Marie Peele, Deceased; Carrie M. Gallops, Individually and as Co-Administratrix of the Estate of Rose Marie Peele, Deceased; Amanda Clark; James Peele; Pamela Collins; Hilda Gibson; Annette Pierce; Deborah Pittman; Ronald Wayne Pool; Delores Pouncy; Mary Ann Darien Primas; John Sloan; Bobby Quick; Kay Quick; Delores Quick; Hallie Quick, Jr.; Georgia Ann Quick; Peggy Brown, Individually and as Administratrix of the Estate of Mary Alice Quick, Deceased; Martin Quick; Laronda Arnold; Nakisha Quick and Terrell Quick, Minors, by and through Peggy Brown as Next Friend; Anne S. Arnold; Willie Quick; Caro-

lyn Rainwater; Lula Mae Smith, Individually and as Administratrix of the Estate of Cynthia Ratliff, Deceased; Martha Nelson, Individually and as Administratrix of the Estate of Martha Ratliff, Deceased; Eugene Nelson; Thurman Nelson and Elaine Nelson, Minors, by and through Martha Nelson as Next Friend; Cleo Reddick; Johnny Reddick; Mary Sue Rich, Individually and as Administratrix of the Estate of Donald Bruce Rich, Jr., Deceased; Cody Allen Rich, Minor, by and through Mary Sue Rich as Next Friend; Richard Roberts; Joy Roberts; Zelda Roberts; John M. Sanders; Barbara Shaw; Jeannette Smith; Reggie Smith; William Smith; William Winston Smith, Jr.; William Noconda Smith, Sr.; Janet Stone; Audrey Sue Teal (now Audrey Sue Scott); Letha Terry; Henry Terry; James Everett Broady, Individually and as Administrator of the Estate of Minnie Mae Thompson, Deceased; James Everett Broady; Teresa Ann Ellerbe; Thomas Ellerbe; James Thompson; Carritha Broady; Sharon Townsend; Betty Eubanks, Individually and as Administratrix of the Estate of Cynthia Wall, Deceased; Charles A. Gainey, III; Clayton Fuller Gainey; Tracy Nicole Chavis, Minor, by and through Betty Eubanks as Next Friend; Jerry Wall; Paul Saunders, Individually and as Administrator of the Estate of Mary Lillian Wall, Deceased; Ella Harrington; Mary Washington; Martha Waters; Weldon Waters; Alice Suggs Webb, Individually and Administratrix of the Estate of Jeffrey Antonio Webb, Deceased; James Prescott Webb; Shawnta Fairley, Minor, by and through Aquanetta Fairley as Next Friend; Betty White; Kenneth White; Darrell Leonard Wilkins, Individually and as Administrator of the Estate of Rose Lynette Jacobs Wilkins, Deceased; Mildred English Jacobs; Conester Williams; Sarah Williams

DEFENDANTS:

Aeroquip Corporation; Amoco Oil Company; BASF Corporation, d/b/a Delaware Mew Corporation and f/k/a Inmont f/k/a BASF Wyandotte Corporation; Chemed Corporation; Chevron U.S.A., Inc.; Commercial & Architectural Products, Inc., d/b/a Marlite, and Marlite; Crane Company, and Unidynamics Corporation, a Subdivision of Crane Company, and Dyrotech Industries, a Subdivision of Unidynamics Company, which includes Kemlite, a Division of Dyrotech Industries; Dana Corporation, which includes Dana, d/b/a Coll-O-Crimp (Weatherhead), a Division of Dana Corporation; DuBois Chemicals, a Division of Chemed Corporation; Eaton Corporation, which includes Eaton Fluid Power Products and Eaton Hydraulics; Echlin Sales Company, which includes Continental Hydraulic Hose, a Division of Echlin Sales Company; Eclipse Incorporated, which includes Eclipse Combustion Division, A Division of Eclipse Incorporated; Frigoscandia Food Process Systems, Inc., and Stein, Inc., and Stein Associates, Inc.; The Gates Rubber Company; Gress Foods Incorporated, which includes Gress Poultry and Gress Refrigeration, and Whitworth Farms; Heberger Corp.; Honeywell, Inc.; ICI Americas, f/k/a ICI Chemical Industries, ICI Acrylics, f/k/a KSH, Inc., a Subdivision of ICI Chemical Industries, which includes K-Lite and K-Lux, Divisions of ICI Acrylics, and K-Lite; JSJ Corporation, d/b/a Sparks Belting Company; Lectronic Systems, Inc.; Lichtman Industrial Supply, Inc.; Liquid Carbonic Carbon Dioxide Corporation; Lubrication Engineers, Inc.; McGill Manufacturing Co., Inc.; Mobil Oil Corporation; Motion Industries; North American Manufacturing, Inc.; North Carolina Foam Industries; North Carolina Natural Gas Corporation; Olympic Oil Company; Parker-Hannifin Corporation; PNC Bank, North-East Pennsylvania, f/k/a Northeastern Bank of Pennsyl-

vania; Sequentia, Inc.; Smith and Chester, Inc., f/k/a W. H. Nichols & Company, Inc., which includes HPI Nichols, a W. H. Nichols & Company, Inc., Company; Southeast Cooler; Square D Company; Superior Door Co.; Texaco, Inc.; Vapor Corporation; Brunswick Corporation, a Division of Vapor Corporation, which includes Raymond Control Systems, a Brunswick Corporation; Wormald Fire Systems, Inc., which includes Wormald Fire Systems, Inc., successor to Ansul Fire Suppression Systems; W. W. Grainger, which includes Grainger, a Division of W. W. Grainger, Inc.; and Ziegler Fire Extinguisher Service, Inc.

No. 95-915

Supreme Court, U.S.
FILED
JAN 26 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

IN RE: AEROQUIP CORPORATION, CHEVRON, U.S.A., PARKER-HANNIFIN CORPORATION, SEQUENTIA, INC., AMOCO OIL COMPANY, BASF CORPORATION, ICI AMERICAS, INC., ICI ACRYLICS, INC., FRIGOSCANDIA FOOD PROCESS SYSTEMS, INC., STEIN, INC., DANA CORPORATION, W.W. GRAINGER, INC., HONEYWELL, INC., CHEMED CORP., GATES RUBBER COMPANY, EATON CORPORATION, SQUARE D COMPANY, CRANE COMPANY, KEMLITE COMPANY, BRUNSWICK CORPORATION, VAPOR CORPORATION, ECLIPSE INCORPORATED, SOUTHEAST COOLER CORPORATION, WORMALD FIRE SYSTEMS, INC., AND MOBIL OIL CORPORATION,

Petitioners.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESTATED QUESTIONS PRESENTED

When a state civil case is removed pursuant to the bankruptcy removal statute, 28 U.S.C. § 1452(a), on the ground that the case is "related to" a bankruptcy case pending in another district, and the removal court, without first ruling on a pending remand motion, transfers the case to the district in which the bankruptcy case is pending, and the transferee court then remands under the bankruptcy remand statute, 28 U.S.C. § 1452(b) to the state court from which the case was originally removed:

1. May the remand order be reviewed either by the court of appeals or by this Court?

2. May the transferee court examine federal subject matter jurisdiction and, if it finds jurisdiction lacking, remand the case under § 1452(b), or does the law of the case doctrine bar consideration of the jurisdictional issue?

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Gibson, *Removal of Claims Related to Bankruptcy Cases: What is a "Claim or Cause of Action?"*, 34 UCLA L. Rev. 1, 28-32 (1986) 16

Respondents respectfully request that the Court deny the Petition for a Writ of Certiorari to review the order of the United States Court of Appeals for the Fourth Circuit denying a Petition for a Writ of Mandamus in this case.

JURISDICTION

The United States District Court for the Middle District of North Carolina remanded this case to the state court from which it was removed pursuant to the bankruptcy remand statute, 28 U.S.C. § 1452(b). Petitioners sought and were denied a writ of mandamus to review the remand order by the United States Court of Appeals for the Fourth Circuit. Congress has expressly provided that an order entered under § 1452(b) "remanding a claim or cause of action . . . is not reviewable . . . by the Supreme Court of the United States under section 1254 of this title." Accordingly, the order below is not subject to review by this Court. *See infra* Reason I for Denying the Writ.

STATEMENT OF THE CASE

The Petition asks this Court to exercise its power of supervision over the federal judicial system in a rare and perhaps unique case. The jurisdictional dispute presented arises from the removal of a state products liability case to a federal bankruptcy court on the purported ground that the claims against one of fifty state court defendants were "related to" a bankruptcy case pending in another district. The Petition asserts that the entire case was properly removed by this one defendant even though the claims against the other defendants were neither "related to" the bankruptcy case nor otherwise independently subject to federal jurisdiction. The district court subsequently transferred the case to the district in which the bankruptcy case was pending without first ruling on a pending remand motion or otherwise determining the existence of federal subject matter jurisdiction.

After considering federal subject matter jurisdiction as a threshold matter, the transferee court remanded the case to the state court from which it was removed. The Petition further asserts that the transferee judge was precluded from even considering the issue of federal subject matter jurisdiction and that his jurisdictional review and subsequent remand "so far departed from the accepted and usual course of judicial proceedings" to require intervention by this Court. Threshold consideration of subject matter jurisdiction by the remanding district court not only was proper, but also was required by fundamental principles of federal jurisdiction. *See infra* Reason II for Denying the Writ.

The massive tort case below asserts personal injury and wrongful death claims predicated on products liability and breach of warranty theories arising from a fire on September 3, 1991 at a chicken processing plant owned by Imperial Food Products, Inc. in Hamlet, North Carolina ("Imperial").[1] These claims arise exclusively under state common law.

The case originally was filed in a Texas state court on July 23, 1993. Pet. at 2a. The almost 200 plaintiffs below include people injured in the fire, the estate representatives of people who died in the fire, and spouses and other relatives who have filed loss of consortium and other derivative claims. *Id.* at 3a. The original 50 defendants were suppliers of materials or services to the Imperial plant. *Id.* All are corporations that do business in Texas, and some are incorporated or have their principal places of

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1. *Albright v. Aeroquip Corp.*, No. 3:94CV447, slip op. at 1-2 (Pet. at 2a-3a) (M.D.N.C. June 26, 1995) [hereinafter citations are to the reprinted opinion found in Appendix B of the Petition].

On June 8, 1992, an involuntary petition was filed against Imperial under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of North Carolina. Imperial failed to answer, and an order for relief under Chapter 7 was entered on June 30, 1992.

business there. *Id.* Imperial was never a defendant in the removed state court action. *Id.*[2]

One defendant, PNC Bank, N.A. ("PNC"), filed a notice of removal under 28 U.S.C. § 1452(a) in the bankruptcy court for the Eastern District of Texas (the "Texas Bankruptcy Court") on the ground that claims asserted against it were property of Imperial's bankruptcy estate. *Id.* Twenty-one of the original forty-nine other defendants joined in PNC's notice of removal. None of these defendants asserted any independent basis for removal.[3] PNC and several other removing defendants subsequently filed motions to dismiss for lack of personal jurisdiction or, in the alternative, for transfer to the United States District Court for the Middle District of North Carolina, where the Imperial bankruptcy was pending. Pet. at 3-4. Plaintiffs below then moved to remand under the bankruptcy remand statute, 28 U.S.C. § 1452(b), asserting that remand was appropriate for lack of subject matter jurisdiction, on equitable grounds, and for procedural defects.[4]

On July 11, 1994, almost a year after the original removal, the Texas Bankruptcy Court filed a Report and Recommendation to the United District Court for the Eastern District of Texas (the "Texas District Court") recommending that the district court either: (i) withdraw the reference to the bankruptcy court and

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2. The personal injury and wrongful death claims asserted by plaintiffs below against Imperial's bankruptcy estate were settled with bankruptcy court approval. As a result, neither Imperial nor its trustee are parties to this action.

3. *See, e.g.* 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1332 (diversity); or 28 U.S.C. § 1334 (bankruptcy).

4. Plaintiffs' Motion to Remand Under 28 U.S.C. § 1452(b) and Motion for Sanctions, at 2. *Albright v. Aeroquip Corp.*, Adv. Proc. No. A-93-1064-5 (Bankr. E.D. Tex., filed Sept. 14, 1993).

transfer the case to the United States District Court for the Middle District of North Carolina under 28 U.S.C. § 157(b)(5); or (ii) dismiss the adversary proceeding without prejudice. While the Texas Bankruptcy Court admittedly found that it lacked subject matter over the removed state court personal injury and wrongful death cases because only a federal district court has jurisdiction over such "non-core" proceedings under 28 U.S.C. § 157(b)(5),[5] its Report and Recommendation neither expressly nor implicitly found that the original removal was properly supported by bankruptcy subject matter jurisdiction under 28 U.S.C. § 1334. Pet. App. D. Notwithstanding the lack of any § 1334 jurisdictional finding, the Petition asserts that "[t]he court of first instance possessed federal subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1334."[6]

On August 5, 1994, the Texas District Court transferred the case to the United States District Court for the Middle District Court of North Carolina (the "North Carolina District Court"). Pet. at 18a-19a. On September 20, 1994, the North Carolina District Court held a status conference at which the parties briefly addressed the issue of federal subject matter jurisdiction under

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5. Pet. at 12a-14a. Section 157(b)(5) only allocates venue over personal injury and wrongful death claims involving a debtor to Article III district courts rather than to Article I bankruptcy courts. *Citibank, N.A. v. White Motor Corp. (In re White Motor Credit)*, 761 F.2d 270, 271 (6th Cir. 1985); *In re U.S. Lines, Inc.*, 128 B.R. 339, 340 (Bankr. S.D.N.Y. 1991). Thus, before § 157(b)(5) comes into play, there must be bankruptcy subject matter jurisdiction under § 1334. *See Things Remembered, Inc. v. Petrarca*, __ U.S. __, 116 S. Ct. 494, 499 n.1 (Ginsburg, J., concurring).

6. Pet. at 3 n.2. The reference to "the court of first instance" is apparently to the Texas Federal District Court rather than the Texas Bankruptcy Court. Although the bankruptcy removal statute, 28 U.S.C. § 1452(a), only authorizes removal to a federal district court, the removal here was directly to the bankruptcy court with a subsequent protective removal to the district court. Pet. at 12a, 14a-15a.

28 U.S.C. § 1334(b). Pet. at 4a.[7] The parties were directed to submit briefs on the issue. Extensive briefs were filed in October 1994 and reply briefs were submitted in November 1994. On February 7, 1995, the parties were directed to file additional briefs on the issue of equitable remand. On June 26, 1995, Judge Tilley of the North Carolina District Court entered an Order and Memorandum Opinion remanding this action to the Texas state court from which it was originally removed.

Responding to the argument that the Texas district judge's adoption of the Texas Bankruptcy Court's Report and Recommendation conclusively determined the existence of federal subject matter jurisdiction and that this determination was the law of the case, Judge Tilley found that

> [the Texas bankruptcy judge] only determined that the Bankruptcy Court did not have subject matter jurisdiction under 28 U.S.C. § 157(b)(5). He made no findings as to whether federal subject matter jurisdiction existed under 28 U.S.C. § 1334(b). As such [the Texas district judge's] adoption of [the] Report and Recommendation did not address the issue of federal subject matter jurisdiction under 28 U.S.C. § 1334(b). *[It] neither*

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7. On September 23, 1994, plaintiffs below and PNC filed a stipulation dismissing PNC from the underlying products liability action. The stipulation was approved by order of the North Carolina District Court dated September 28, 1994. The stipulation dismissing PNC was based on a settlement agreement dated February 22, 1994, which was almost six months prior to the transfer of the case to the North Carolina District Court. The settlement released all claims by plaintiffs below against PNC, and contained verdict reduction provisions eliminating any codefendant contribution or indemnity claims against PNC. Pet. at 4a. The Chapter 7 Trustee of the Imperial bankruptcy estate also fully settled all estate claims against PNC. *Id.*

> *expressly nor impliedly decided the issue [of] federal subject jurisdiction under 28 U.S.C. § 1334(b). Consequently, the law of the case doctrine does not come into play.*

Pet. at 6a (emphasis supplied).

Two days after the remand order was entered, a Petition for a Writ of Mandamus and Related Relief and an Emergency Motion for Stay were filed in the United States Court of Appeals for the Fourth Circuit. A response to the emergency stay motion was filed, asserting that (i) the court of appeals lacked appellate jurisdiction to review the § 1452(b) remand order; and (ii) the petition failed to demonstrate a clear abuse of judicial authority by the district court. On June 30, 1995, Judge Phillips entered an order for the Fourth Circuit panel staying the remand order.

On August 2, 1995, the Fourth Circuit panel summarily denied mandamus relief. Thereafter, on August 4, 1995, a Petition for Rehearing and Suggestion for Rehearing in Banc was filed. Contemporaneously with the filing of this petition, petitioners below filed an Emergency Motion for Stay. Respondents below opposed the stay, and Petitioners' emergency request for a stay was subsequently denied. On August 17, 1995, the underlying case was sent to the Texas state court from which it was originally removed.

At the request of the court of appeals, on August 18, 1995, respondents below filed a brief in response to the rehearing petition. On September 12, 1995, the Fourth Circuit denied the rehearing petition.

The Petition states that a three-judge panel of the "Fourth Circuit denied the Petition for Mandamus with no explanation for its decision." Pet. at 6. In their rehearing petition below, Petitioners asserted that the panel must have overlooked or

misapprehended the North Carolina District Court's purported lack of authority to remand under § 1452(b) on the sole ground that the panel failed to write an opinion. Just because the panel failed to write an opinion denying the writ of mandamus does not mean that the panel did not review and reject Petitioners' arguments under § 1452(b).

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT'S REMAND ORDER IS NOT REVIEWABLE EITHER BY THE COURT OF APPEALS OR BY THIS COURT.

A. 28 U.S.C. § 1452(b) Proscribes Review.

The North Carolina District Court's remand order was based on the bankruptcy remand statute, 28 U.S.C. § 1452(b). Congress has expressly provided that an order under this statute "is not reviewable by appeal or otherwise by the court of appeals" or by this Court. *Id.* Hence, the Fourth Circuit properly denied the petition for a writ of mandamus, and this Court should likewise deny the Petition for a Writ of Certiorari.

Attempting to circumvent § 1452(b)'s unequivocal language prohibiting review, Petitioners assert that the North Carolina District Court lacked authority to remand because it was not the "court" to which the state court action was originally removed. They narrowly interpret the word "court," in the first sentence of § 1452(b) to mean only the "district court for the district where such civil action is pending" [8] and no other court. Petitioner's reading of § 1452(b) should be rejected.

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8. The language "the district court for the district where such action is pending" is only a limitation on removal. It is not a limitation on remand. *Compare* 28 U.S.C. § 1452(a) (bankruptcy removal) with 28 U.S.C. § 1452(b) (bankruptcy remand).

While Congress appropriately limited removal to the specific federal district court embracing the geographic location of the pending state court action,[9] remand is not similarly limited. There are very simple and compelling reasons for this distinction. If removal were not geographically limited, a defendant could improperly remove a case directly to a judicial district hundreds or even thousands of miles away from the location of the state court where the action was filed, and thus cause a plaintiff unreasonable burden and expense in moving to remand. On the other hand, remand cannot be geographically limited because a case may be improperly removed and transferred before a jurisdictional defect is discovered. Whenever a jurisdictional defect is discovered, a federal court wherever located must remand or dismiss a removed case. If, as here, the initial removal court transfers the case without first deciding a remand motion, and the initial removal is improper, under Petitioners' view the transferee court lacks authority to remand because it is not the specific geographic district court to which the case was initially removed. This view is inconsistent with both case law and fundamental principles of federal jurisdiction.[10] Accordingly, the word "court" in § 1452(b) logically must be interpreted to mean any federal court.

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9. 28 U.S.C. § 1441 ("to the district court . . . for the district and division embracing the place where such action is pending.") (general removal); 28 U.S.C. § 1452(a) ("the district court for the district where such civil action is pending") (bankruptcy removal).

10. Not limiting remand geographically is appropriate even if the initial removal is proper because subsequent litigation developments may leave claims in federal court lacking any independent basis for federal jurisdiction. For example, if a federal question and supplemental state claims are properly removed from a state court, and the federal question is dismissed or compromised, the federal court would ordinarily remand the state claims. *See, e.g., Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 351 (1988) (court may remand rather than dismiss pendent state law claims if federally sufficient claim is discontinued); *United Mine Workers of America v. Gibbs,* 383 U.S.

(Cont'd)

This interpretation of § 1452(b) is supported by Justice Ginsburg's concurring opinion in *Things Remembered., Inc. v. Petrarca*, __ U.S. __, 116 S. Ct. 494 (1995), decided only last month. Rejecting a literal reading of the word "equitable" in the first sentence of § 1452(b), Justice Ginsburg observed that a word's meaning cannot be determined in isolation, and that statutory interpretation must be guided not by a single word, but by all of its provisions, and its object and policy. *Id.* at 500 *(quoting John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, __ U.S. __, 114 S. Ct. 517, 523 (1993) *(quoting Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)).

Petitioners' interpretation of the word "court" in § 1452(b) fails to consider the objects and policies of Congress in providing for bankruptcy removal and remand in a unified federal judicial system. Thus, Petitioners' limited view of § 1452(b) should be rejected. Since the word "court" in § 1452(b) must be interpreted to mean any federal district court, Judge Tilley had authority to remand under § 1452(b). Accordingly, this Court may not review his order because Congress has expressly prohibited review.

B. 28 U.S.C. § 1447(d) Proscribes Review.

Although Judge Tilley's remand order was expressly based

(Cont'd)

715, 726 (1966) (court has discretion to remand nondiversity state claims if the federal question is dismissed before trial); 28 U.S.C. § 1367(c) (providing factors to consider in exercising discretionary jurisdiction over supplemental claims). But under Petitioners' analysis, if the initial removal court transferred venue after removal, the transferee court has no authority to remand the remaining state claims because it is not the same geographic district court to which the state case was originally removed under § 1452(a). Thus, even if the initial removal below properly removed the entire case, only federally insufficient claims remained after the dismissal of PNC, justifying discretionary remand under § 1452(b). *See infra* Reason II B for Denying the Writ.

on equitable grounds, even casual scrutiny of his opinion reveals that he also based his decision to remand on lack of federal subject matter jurisdiction. None of the claims against the remaining forty-eight defendants subject to the remand order were independently within federal subject matter jurisdiction. They were neither federal questions under 28 U.S.C. § 1331, nor were they diversity claims under 28 U.S.C. § 1332. Therefore, the only possible basis for federal jurisdiction was 28 U.S.C. § 1334, "the root jurisdictional provision governing" cases and proceedings in bankruptcy.[11]

Personal injury and wrongful death claims, even by third parties against the debtor, generally qualify for removal only under § 1334(b)'s "related to" provision.[12] Consequently, unless the claims against the remaining defendants below "related to" Imperial's bankruptcy case, no federal court had jurisdiction over them — not the Texas Bankruptcy Court, not the Texas District Court, and certainly not the North Carolina District Court, especially after the claims against PNC were dismissed.

Judge Tilley rejected Petitioner's arguments that the claims against them were "related to" the Imperial bankruptcy:

> First, the present state law claims are not sufficiently related to the Imperial bankruptcy proceedings. . . . Second, because the present state law claims are unrelated to the Imperial bankruptcy proceeding, the Court finds that a remand to state court would have very little, if any,

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11. *Things Remembered*, __ U.S. at __, 116 S. Ct. at 499 n. 1 (Ginsburg, J., concurring).

12. *See* 28 U.S.C. § 157(b)(3) (requires determination of "related to" jurisdiction).

> effect on the administration of the bankruptcy estate.

Pet. at 7a-8a.

Consequently, the remand order not only was based on equitable grounds, but also on the ground that the North Carolina District Court lacked subject matter jurisdiction over the remaining defendants under 28 U.S.C. § 1334(b). The Petition glosses over this conclusion, and repeatedly maintains that there were no jurisdictional defects below.[13] This is plainly incorrect and explicitly contradicted by Judge Tilley's opinion.

Moreover, Petitioners ignore the fact that § 1452(b) is the only explicit bankruptcy remand statute. Although removal is provided for by § 1452(a), only § 1452(b) provides for remand. Remand may be based on lack of subject matter jurisdiction, procedural defects, or traditional equitable factors. Since § 1452(b) is the only bankruptcy remand provision, it must be used for remand on any ground. This conclusion is buttressed by Justice Ginsburg's concurring opinion in *Things Remembered*, __ U.S. at __, 116 S. Ct. at 498-500, stating that equitable remand under § 1452(b) includes remand for untimely removal because "[a] restrictive definition of what is 'equitable' could invite wasteful controversy over the reviewability of bankruptcy case remand orders. . . ." Thus, remand under § 1452(b) includes remand for lack of subject matter jurisdiction. Accordingly, Judge Tilley properly remanded for lack of subject matter jurisdiction under § 1452(b), and Congress has prohibited review of his order.

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13. *See, e.g.*, Pet. at 3 n.2 ("court of first instance possessed federal subject matter jurisdiction"); *id.* at 12 ("there were no jurisdictional defects in this action."); *id.* at 16 ("there are no procedural or jurisdictional defects in the present case").

Even if the remand for lack of subject matter jurisdiction could not be based on § 1452(b), it would still be unreviewable by this Court under the general statutory provision governing reviewability of remand orders. *See* 28 U.S.C. § 1447(d).

In *Things Remembered,* Justice Thomas' opinion for a unanimous Court concluded that § 1447(d) applies both to general removal and to any other statutory provision for removal, obviously including bankruptcy removable under § 1452(a). *See* __ U.S. at __, 116 S. Ct. at 497. Section 1447(d)'s preclusion of review only applies to remands based on grounds specified in § 1447(c). Lack of subject matter jurisdiction is the most significant ground for remand recognized by § 1447(c). Since the remand order below not only was based on equitable grounds but also was based on lack of subject matter jurisdiction, it is independently unreviewable under § 1447(d), which is fully applicable to bankruptcy under *Things Remembered.*

The Petition attempts to distinguish *Things Remembered* because it specifically concerned remand based on untimely removal rather than remand predicated on traditional equitable grounds, or for lack of subject matter jurisdiction. Pet. at 11, 15-16. Although the Petition superficially distinguishes the letter of *Things Remembered,* it cannot distinguish or ignore its spirit. The spirit of *Things Remembered* requires that this Court give meaning to Congress' preclusion of review to any district court remand order for lack of subject matter jurisdiction, whether based on the general remand statute §§ 1447(c) and (d) or the bankruptcy remand statute, § 1452(b).

Consequently, the remand order is additionally not reviewable under 28 U.S.C. § 1447(d).

II.

SINCE THE ISSUE OF FEDERAL SUBJECT MATTER JURISDICTION WAS NEVER DECIDED PRIOR TO TRANSFER, THE ISSUE REMAINED OPEN AND WAS PROPERLY DECIDED BY THE NORTH CAROLINA DISTRICT COURT.

A. The Law of the Case Doctrine Is Inapplicable.

The Petition is fundamentally flawed because it asks this Court to uphold federal jurisdiction found only by implication, and to immunize the implied finding from review under the law of the case doctrine.[14] The Court should reject this request and deny the Petition.

Petitioners insist that by transferring the underlying case to the North Carolina District Court, "the Texas District Court implicitly denied Plaintiffs' motion for remand." Pet. at 9. Their unstated conclusion is that proper bankruptcy subject matter jurisdiction was inferentially found under 28 U.S.C. § 1334. This unstated conclusion is belied, however, by the Texas Bankruptcy Court's Report and Recommendation on which the transfer order was based. *See* Pet. at 5a-6a; 10a-15a. Given the ambiguous nature of the Report and Recommendation, the North Carolina District Court was required to give threshold consideration to

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14. Petitioners' reliance on *Celotex Corp. v. Edwards*, __U.S. __, 115 S. Ct. 1493 (1995) for this argument is misplaced. *Celotex is* plainly distinguishable because it concerned conflicting federal court orders over property that may have been essential to a successful reorganization of a Chapter 11 debtor. Despite Petitioners' assertion to the contrary, there were no conflicting orders in the case below. The Texas District Court only ordered a transfer. The North Carolina District Court ordered remand for lack of subject matter jurisdiction and on equitable grounds.

subject matter jurisdiction under fundamental principles governing federal courts. *See infra* Reason II B for Denying the Writ.

In *Things Remembered,* Justice Ginsburg recently observed that "every federal court, whether trial or appellate, is obligated to notice want of subject matter jurisdiction on its own motion." 116 S. Ct. at 499 n.1 (*citing Mansfield., C. & L.MR. Co. v. Swan,* 111 U.S. 379, 382 (1884)). Judge Tilley fulfilled this obligation by requiring the parties to address subject matter jurisdiction as a threshold matter after the transfer.

In remanding, Judge Tilley recognized the fundamental principle that federal subject matter jurisdiction is sacrosanct — it cannot be waived, it cannot be achieved by consent, and it cannot be conferred by implication.[15] Moreover, lack of federal subject matter jurisdiction may be raised even for the first time on appeal, even for the first time on direct review in this Court, and even by the party who improperly invoked it and lost on the merits. *See, e.g. American Fire & Casualty v. Finn,* 341 U.S. 6 (1951) (by party who invoked jurisdiction and lost on merits); *Louisville & Nashville R.R. Co. v. Mottley,* 211 U.S. 149 (1908) (by defendant who lost on the merits); *Capron v. Van Noorden,* 6 U. S . (2 Cranch) 126 (1804) (by party who invoked jurisdiction and lost on the merits); C. WRIGHT, LAW OF FEDERAL COURTS § 7, at 28 (5th ed. 1994) (harsh rule of dismissal on application of the losing party "justified by the delicate problems of federal-state relations").

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15. *See, e.g.* E. CHEMERINSKY, FEDERAL JURISDICTION § 5.1, at 249-50 (2d ed. 1994) (noting that "subject matter jurisdiction may be challenged at any point and by either party"); 5A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350, at 204-05 (2d ed. 1990) (defense of lack of subject matter jurisdiction even if "overruled, stricken, or excluded" may be reasserted at "any time"); Fed. R. Civ. P. 12(h)(3) (implying that subject matter jurisdiction may be raised at any time by any party or by the court *sua sponte).*

Despite the hodgepodge of case law cited at pages 7-11 of the Petition, no case cited holds that federal subject matter jurisdiction may be upheld based on implication and application of the law of the case doctrine. The principal opinion cited for Petitioners' law of the case argument *is Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988), which dealt with whether a transfer order by another district court could be considered "law of the case." Although acknowledging that a transfer order could be considered the law of the case, this Court rejected application of the doctrine in the case before it. Transfer orders, unlike subject matter jurisdiction, are based on highly fact specific discretionary rulings and thus are appropriate for law of the case treatment. Subject matter jurisdiction, in contrast, cannot be based on discretion, and must either exist or not exist. Indeed, there is a presumption that a "court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists."[16]

Finally, and perhaps most significantly, the law of the case doctrine " 'merely expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power.' " *Id.* at 817 *(quoting Messinger v. Anderson,* 225 U. S . 436, 444 (1912) (citations omitted)). Accordingly, even if the Texas District Court actually decided the issue, the North Carolina District Court could have reconsidered subject matter jurisdiction. Certainly, when a district court's decision is textually ambiguous, as the Texas District Court's decision is here, review is not only permissible, but required when the issue is federal subject matter jurisdiction. Otherwise a federal court would fail in its unflagging obligation zealously to guard against expansion of limited federal subject matter jurisdiction.

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16. C. WRIGHT, LAW OF FEDERAL COURTS § 7, at 27 (5th ed. 1994), *citing Turner v. Bank of North America,* 4 U.S. (4 Dall.) 8 (1799).

B. The North Carolina District Court Properly Remanded Federally Insufficient Claims.

Judge Tilley correctly decided that federal subject matter jurisdiction was lacking and properly remanded the action to the state court from which it was removed. The claims against Petitioners were never "related to" Imperial's bankruptcy, and thus, never had an independent basis for federal subject matter jurisdiction.[17] Consequently, when the arguably federally sufficient claims against PNC were dismissed, there was no sound jurisdictional reason for Judge Tilley to keep these claims. Outside of bankruptcy, under either pendent or supplemental jurisdiction, a federal court confronted with this situation has discretion to, and almost always would, remand the federally insufficient claims. *See, e.g., Carnegie-Mellon v. University of*

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17. Petitioners assert that the entire case was properly removed by PNC pursuant to 28 U.S.C. § 1452(a). Pet. at 3. Section 1452(a) expressly limits removal to specific "claims" or "causes of action" over which the district courts have subject matter jurisdiction under 28 U.S.C. § 1334(b). In non-bankruptcy multi-party litigation, all defendants must join in the removal for the removal to be effective unless the basis for removal is a separate and independent federal claim. 28 U.S.C. § 1441(c). Only under § 1441(c) can removal by one defendant (*i.e.*, the one against whom a separate federal claim is asserted) remove the entire case. Once the case is removed, the court has discretion to remand all matters in which state law predominates. There is no functional equivalent to § 1441(c) for bankruptcy removal. Only § 1452(a) provides any basis for bankruptcy removal, and the scope of removal under this section only encompasses individual "claims" or "causes of action." This makes sense because even against a single defendant one claim may impact the bankruptcy case and thus give rise to "related to" jurisdiction, and another claim may not. For example, a claim with an absolute right to contractual indemnity from the estate may be joined with a claim against the same defendant lacking any contractual right. Only the former claim may impact the estate, and under § 1452(a), only the former claim may be removed because it falls within § 1334(b) "related to" jurisdiction." *See* Gibson, *Removal of Claims Related lo Bankruptcy Cases: What is a "Claim or Cause of Action? "*, 34 UCLA L. Rev. 1, 28-32 (1986).

Cohill, 484 U.S. 343, 351 (1988) (district court may remand rather than dismiss pendent state claims if federally sufficient claim is discontinued).

Petitioners imply, however, that federal jurisdiction is fixed forever at the time of removal, and that subsequent events cannot affect the propriety of federal jurisdiction. Under this view, the federal judicial system would be saddled with federally insufficient claims forever, even after the only arguably federally sufficient claims have been dismissed or discontinued. As demonstrated by *Carnegie-Mellon*, this view is incorrect for removal outside bankruptcy, and should be rejected for bankruptcy removal as well. *Cf. Tschirn v. Secor Bank*, 123 B.R. 215, 217 (Bankr. E.D. La. 1991) (post-removal events can divest a court of bankruptcy jurisdiction).

III.

PETITIONERS COULD HAVE CHALLENGED PERSONAL JURISDICTION IN THE TEXAS STATE COURTS UNDER THE DUE PROCESS CLAUSE.

In the courts below, Petitioners repeatedly asserted that a trial of this case in Texas would violate their due process rights.[18] The Petition indirectly makes the same argument. *See* Pet. at 3-5, 9-10.

Under fundamental principles of federalism, Petitioners could have challenged personal jurisdiction in the Texas state courts. *Cf. Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 10 (1987) (federal court in New York required to abstain from interfering with a pending Texas state court litigation). If they had a federal

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18. *See, e.g.* Defendants' Brief on Jurisdiction, Venue and Due Process at 25-28. *Albright v. Aeroquip Corp.*, No. 3:94CV477 (M.D.N.C., filed Oct. 20, 1994).

due process defense to personal jurisdiction in Texas, Petitioners could have asserted this defense in the properly pending state court proceeding. Instead, Petitioners' joined in the removal of the state tort case, asserting that the claims against them were related to Imperial's bankruptcy even though there was never independent "related to" jurisdiction over these claims.

Despite Petitioners' claim that they had no remedy in Texas,[19] the Texas state court had an obligation under the supremacy clause to adjudicate Petitioners' federal due process defense, including any arguments under the "fair play and substantial justice" branch of the two-branch test of jurisdictional due process. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

Petitioners' personal jurisdiction arguments failed to sway Judge Tilley from his threshold task and principal obligation as a federal judge — *i.e.*, to determine the existence of federal subject matter jurisdiction. Having concluded that all claims against the remaining defendants lacked any federal jurisdictional basis after the dismissal of PNC, Judge Tilley's obligation was to remand the case to the state court from which it was removed. He fulfilled this obligation.

Accordingly, there is nothing in this case that warrants this Court's attention.

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19. *See* Pet. at 3 n.3 (plaintiffs' forum shopping could not be challenged in the state court).

CONCLUSION

The Petition does not raise any issues calling for an extraordinary exercise of this Court's supervisory powers over the federal judicial system. For this reason and the other reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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(3)

No. 95-915

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

IN RE: AEROQUIP CORPORATION, CHEVRON, U.S.A., PARKER-HANNIFIN CORPORATION, SEQUENTIA, INC., AMOCO OIL COMPANY, BASF CORPORATION, ICI AMERICAS, INC., ICI ACRYLICS, INC., FRIGOSCANDIA FOOD PROCESS SYSTEMS, INC., STEIN, INC., DANA CORPORATION, W.W. GRAINGER, INC., HONEYWELL, INC., CHEMED CORP., GATES RUBBER COMPANY, EATON CORPORATION, SQUARE D COMPANY, CRANE COMPANY, KEMLITE COMPANY, BRUNSWICK CORPORATION, VAPOR CORPORATION, ECLIPSE INCORPORATED, SOUTHEAST COOLER CORPORATION, WORMALD FIRE SYSTEMS, INC., and MOBIL OIL CORPORATION,

Petitioners.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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LIST OF PARTIES

Pursuant to Supreme Court Rule 29.6, Petitioners refer the Court to the list of parties and their parent companies and publicly held nonwholly owned subsidiaries contained in their Petition for Writ of Certiorari, at ii-iii.

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OTHER

Supreme Court Rule 29.6 i

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-915

IN RE: AEROQUIP CORPORATION, CHEVRON, U.S.A., PARKER-HANNIFIN CORPORATION, SEQUENTIA, INC., AMOCO OIL COMPANY, BASF CORPORATION, ICI AMERICAS, INC., ICI ACRYLICS, INC., FRIGOSCANDIA FOOD PROCESS SYSTEMS, INC., STEIN, INC., DANA CORPORATION, W.W. GRAINGER, INC., HONEYWELL, INC., CHEMED CORP., GATES RUBBER COMPANY, EATON CORPORATION, SQUARE D COMPANY, CRANE COMPANY, KEMLITE COMPANY, BRUNSWICK CORPORATION, VAPOR CORPORATION, ECLIPSE INCORPORATED, SOUTHEAST COOLER CORPORATION, WORMALD FIRE SYSTEMS, INC., and MOBIL OIL CORPORATION,

Petitioners.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

ARGUMENT

Unable to refute the grounds relied upon by Petitioners in seeking this writ of certiorari, Respondents have resorted to rewriting without support the North Carolina District Court's remand order. Despite Respondents' attempts to obfuscate the District Court's opinion, the District Court's remand order means what it says and, as written, it is an improper and unauthorized exercise of

power by the Court. Respondents' Brief in Opposition cannot alter the plain meaning of the District Court's opinion. Review by this Court is necessary and proper.

I. THE NORTH CAROLINA DISTRICT COURT'S ORDER REMANDING THIS CASE IS REVIEWABLE.

This Court's holding in *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), establishes the reviewability of the improper North Carolina District Court's order remanding this case. The continued vitality of *Thermtron* has recently been recognized by this Court in *Things Remembered, Inc. v. Petrarca*, —— U.S. ——, 116 S. Ct. 494 (1995) (holding that a court of appeals lacks jurisdiction to review a remand order based upon a defect in removal procedure or lack of subject matter jurisdiction).

A. The North Carolina District Court Expressly and Exclusively Based Remand on Specific Equitable Grounds Which Did Not Include a Lack of Subject Matter Jurisdiction.

Respondents concede that the North Carolina District Court's remand order was "*expressly based on equitable grounds.*" Respondents' Brief in Opposition, at 9-10 (emphasis added). Despite this admission, Respondents attempt to rewrite the decision and assert that the District Court's opinion was also based upon a finding of lack of federal subject matter jurisdiction. Any level of scrutiny precludes a conclusion that the remand order was premised on such a finding of lack of subject matter jurisdiction. The decision means what it says and says what it means.

Judge Tilley recounted in his opinion:

> On February 7, 1994, this Court sent a letter to all counsel of record indicating that while the Court was not discounting remand under 28 U.S.C.

> § 1452(a)[1], it believed that remand on equitable grounds might be appropriate under 28 U.S.C. § 1452(b). Because the propriety of remand under 28 U.S.C. § 1452(b) was not discussed at length in either Plaintiffs or Defendants' original briefs, the Court allowed the parties additional time to submit briefs on the issue of remand under 28 U.S.C. § 1452(b). After careful consideration of the briefs and applicable law, this Court determines that a remand is appropriate under 28 U.S.C. § 1452(b).

Memorandum Opinion, Pet. at 4a-5a (footnote in Opinion omitted). By mentioning both § 1452(a) and § 1452(b) as sections he had considered as a possible basis for remand and then holding that remand is appropriate under § 1452(b), Judge Tilley necessarily excluded § 1452(a) as a basis for his ruling.

Judge Tilley focused his decision on the equitable grounds for remand (§ 1452(b)):

> Courts have listed several factors to be considered in determining whether a remand is appropriate in a particular case *under § 1452(b).* Such factors include (1) duplication of judicial resources; (2) uneconomical use of judicial resources; (3) effect of remand on the administration of the bankruptcy estate; (4) the relatedness or remoteness of the action to the bankruptcy case; (5) case involves questions of state law better addressed by a state court; (6) comity; (7) prejudice to the involuntarily removed parties; (8) lessened possibility of an inconsistent result; and (9) expertise of the court where the action originated.

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[1] Section 1452(a) provides:

> A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, *if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.*

28 U.S.C. § 1452(a) (emphasis added).

Pet. at 7a (citations omitted) (emphasis added). Judge Tilley expressly held that "[*i*]*n considering these factors, the Court finds that remand would be appropriate in this case.*" *Id.* (emphasis added). He reached this conclusion by stating that five of the nine potential equitable factors favored neither side on the issue of remand, but that the other four equitable factors supported a remand. Judge Tilley *did not rely upon, or even mention*, a lack of subject matter jurisdiction as a basis for his remand order. There is no room in Judge Tilley's decision for an interpretive exercise as Respondents suggest.

Although Justice Ginsburg's concurring opinion in *Things Remembered* indicates that lack of subject matter jurisdiction *could* be included as an equitable ground for remand under § 1452(b), *see Things Remembered*, 116 S. Ct. at 500, Judge Tilley did not include that ground as a basis for his remand order in this case. Judge Tilley's specific recitation of the equitable factors upon which he relied precludes Respondents' attempts to add lack of subject matter jurisdiction as an additional ground in an effort to shield this case from review under the recent authority of *Things Remembered*. The remand in this case was limited to equitable factors, and it was accomplished by usurping the power of a sister court and transcending proper statutory authority of the transferee court.

B. The North Carolina District Court's Improper and Unauthorized Remand Order Is Reviewable.

Things Remembered does not disturb the authority of *Thermtron* which allows review of an improper or unauthorized order remanding a case by writ of mandamus where no other adequate remedy is available. Where, as here, a remand decision was outside the power of the court, review is warranted. Mandamus was the appropriate means to vacate the District Court's order and this Court may properly review the Fourth Circuit's denial of the Petition for Writ of Mandamus in this case.

II. THIS COURT SHOULD NOT SANCTION AN INTERPRETATION OF 28 U.S.C. § 1452(b) THAT IGNORES ITS EXPRESS WORDS OF LIMITATION.

Respondents engage in sophistry in arguing that the *word* "court" in § 1452(b) can mean "any federal district court." Their argument is disingenuous because it ignores the language that qualifies the word "court" in the statute. Standard statutory interpretation requires a court to give effect to every phrase in a statute. *See United States v. Neal*, 27 F.3d 90, 93 (4th Cir. 1994); *see also In re Kitchin Equipment Co. of Virginia*, 960 F.2d 1242, 1247 (4th Cir. 1992) ("It is an axiom of statutory construction that courts are obliged to give effect, if possible, to every word used by the legislature.").

Section 1452(b) expressly limits the power to remand a claim or cause of action on any equitable ground to "the court *to which such claim or cause of action is removed*." 28 U.S.C. § 1452(b) (emphasis added).[2] If Congress meant to say that any federal district court could remand on equitable grounds it would not have adopted specific limiting language which expressly restricts the remand power. The modifying phrase "to which a claim or cause of action is removed" must be given its plain meaning.

Congress intended equitable factors to be considered by the court to which the claim or cause was removed. Respondents cleverly offer a rationale for authority of a transferee court to remand by suggesting such a court can discover a jurisdictional defect. In such a case, plaintiffs argue that a transferee court could remand under § 1452(b). This court need not reach this strained hypo-

[2] To the extent Justice Ginsburg's concurring opinion in *Things Remembered* allows lack of subject matter jurisdiction to be included as an equitable ground for remand and any court may consider a lack of subject matter jurisdiction at any time, there may be an argument for an exception to § 1452(b) where a court remands for lack of subject matter jurisdiction. However, as discussed *supra*, the North Carolina District Court did not base its remand order on lack of subject matter jurisdiction.

thetical. *The North Carolina District Court did not remand this case for any jurisdictional defect.* Rather, it relied upon the traditional factors to be considered in determining whether equitable remand was appropriate under § 1452(b). Pet. at 7a. Where such traditional factors are to be assessed, the removal court is in the best position to assess such issues as duplication or uneconomical use of judicial resources, comity, prejudice to involuntarily removed parties and the expertise of the court where the case originated. *See River Cement Co. v. Bangert Bros. Constr. Co.*, 852 F. Supp. 25, 27 (D. Colo. 1994). Petitioners contend the Texas District Court made just such an analysis prior to transferring the case to North Carolina.

Thus, in this case, where remand is based upon traditional equitable factors, only the court to which the case was removed had the power to determine if remand was appropriate. That court (the Texas District Court) declined Respondents' invitation to remand the case and, instead, transferred it to North Carolina "where it belongs."

CONCLUSION

For the reasons set forth above, as well as those set forth more fully in the Petition for Writ of Certiorari, this Court should review this case in order to address the departure of the North Carolina District Court from the accepted and usual course of judicial proceeding.

Respectfully submitted,

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